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In the
Supreme Court of the United States

PATRICK MCCRORY, in his capacity as Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, and A. GRANT WHITNEY, JR., in his capacity as Chairman of the North Carolina State Board of Elections,

Appellants,

v.

DAVID HARRIS and CHRISTINE BOWSER,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

JOINT APPENDIX VOLUME VII

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TABLE OF CONTENTS

Page

VOLUME I

ECF 65 - Memorandum Order denying Plaintiffs' Motion for Preliminary Injunction and Denying Defendants' Motion to Stay, Defer, or Abstain, U.S. District Court for North Carolina Middle District (May 22, 2014) 1

ECF 95 - Notice by Christine Bowser, David Harris of Parties' Joint Filing of State-Court Record, U.S. District Court for North Carolina Middle District (July 1, 2015)..... 10

ECF 104 - Defendants' Rule 26(a)(3)(A) Disclosures, U.S. District Court for North Carolina Middle District (September 14, 2015)..... 15

ECF 125 Parties' Joint Factual Stipulation, U.S. District Court for North Carolina Middle District (October 12, 2015) 235

ECF 144 - Defendants' Notice of Appeal, U.S. District Court for North Carolina Middle District (February 8, 2016) 242

P-006 - Letter from the US DOJ to NC DOJ Preclearing the 2011 Congressional Redistricting Plan (November 1, 2011) 246

P-007 - Letter from U.S. Rep. G.K. Butterfield to N.C. Sen. Rucho and N.C. Rep. Lewis re: July 19, 2011 Joint Statement (2011) 248

TABLE OF CONTENTS—Continued

Page

P-010 - Letter with attachment from U.S. Rep. Mel Watt to N.C. Sen. Rucho and N.C. Rep. Lewis re: Statement Regarding Proposed VRA Districts (July 8, 2011) 251

P-013 - NAACP e-mail from Brent Woodcox to Tom Farr and e-mail string re: attorney client communications (June 30, 2011) 259

P-015 - Second Affidavit of David Peterson, Superior Court of Wake County, North Carolina (January 4, 2012) 262

P-016 - Fourth Affidavit of David W. Peterson, Superior Court of Wake County, North Carolina (May 8, 2012) 289

P-017 - Expert Report of Stephen Ansolabehere (December 23, 2013) 306

P-018 - Report of Stephen Ansolabehere in Response to Thomas B. Hofeller (January 29, 2014) 338

P-067 - Statement by Senator Rob Rucho and Representative David Lewis re the Proposed 2011 Congressional Plan (July 1, 2011) 353

P-068 – Joint Statement by NC Sen. Rob Rucho and NC Rep, David Lewis re the Release of Rucho-Lewis Congress 2 (July 19, 2011) 362

P-069 – Data Analysis Charts for N.C. Congressional Races: 1992-2001, including Districts 1, 4, 5, 7, 8, 9, 11, 12, 13 367

TABLE OF CONTENTS—Continued

Page

P-071 - Second Joint Stipulation (Dickson v. Rucho), Superior Court of Wake County, North Carolina (February 25, 2013) 381

P-072 - 1992 Section 5 Submission (Letter and Compendium from NC DOJ to US DOJ re 1992 Congressional Plan) (January 28, 1992) 394

P-073 - 1997 Section 5 Submission (Letter and Compendium from NC BoE to US DOJ re 1997 Congressional Plan) (April 9, 1997) 421

P-074 - 2011 Section 5 Submission (2011 Congressional Plan enacted by NC General Assembly on July 28, 2011) 457

P-078 – Comparison of NC Congressional Districts in Section 5 Counties for 1997, 2001 & 2011 491

P-106 2011 NC CD 1 VAP by Race and Ethnicity 493

P-107 2011 NC CD 12 VAP by Race and Ethnicity 499

P-111 – District Attributes: VAP by Race, Data for the NC Congressional Plan in effect between 2001 and 2011 503

VOLUME II

P-129 - Deposition Transcript of Thomas Hofeller Harris v. McCrory, U.S. District Court for North Carolina Middle District (May 6, 2014) 504

TABLE OF CONTENTS—Continued

Page

P-136 – NC General Assembly Joint Senate and House Redistricting Committees Meeting Transcript (July 21, 2011) 605

P- 137 - NC General Assembly Senate Redistricting Committee Hearing Transcript (July 21, 2011)..... 654

P-139 - NC General Assembly Senate Floor Debate Transcript (July 25, 2011)..... 685

P-140 - NC General Assembly House Redistricting Committee Transcript of Meeting on Senate passed Redistricting Plan (July 27, 2011)..... 825

VOLUME III

D-2.28 – 2001 Split VTDs in Districts with 40% or Greater Total Black VAPs (CDs 1 and 12) 866

D-2.60 - 2001 Congressional Plan - Districts with non-Hispanic White VAP under 50%, Election Winners (CDs 1 and 12)..... 867

D-2.64 - 2001 Congressional Plan - Districts with Black Voter Registration Over 40%, Election Winners (CDs 1 and 12) 868

D-2.66 - SCSJ Congress – Districts with Black Voter Registration Over 40%, Incumbents (CDs 1 and 12)..... 869

D-2.67 - Fair and Legal Congress - Districts with Black Voter Registration Over 40%, Incumbents (CDs 1 and 12) 870

TABLE OF CONTENTS—Continued

Page

D-4.5 - Congress Zero Deviation NC CD Map (2010 Census), including Actual Population based on 2010 Census Results, by VAPs, and for 2004 and 2010 Election Results 871

D-5.6 - Excerpt of NC General Assembly House and Senate Redistricting Committees Public Hearing Transcript (May 9, 2011) 876

D-5.7 – Testimony of Anita Earls, SCSJ-NAACP before NC General Assembly 2011 Redistricting Public Hearing (May 9, 2011) 883

Dr. Ray Block, Jr., Executive Statement, Racially Polarized Voting In 2006, 2008, and 2010 in NC State Legislative Contests: A Report for the SCSJ (2011) 888

Anita S. Earls, Emily Wynes, LeeAnn Quatrucci, Voting Rights In North Carolina: 1982-2006, 17 S. Cal. Rev. L. & Soc. Just. 577 (2008) 903

D-5.8 - Executive Statement by Dr. Ray Block, Jr., Racially Polarized Voting In 2006, 2008, and 2010 in NC State Legislative Contests: A Report for the SCSJ (2011) 956

D-5.10 - Thomas L. Brunell, Report on Racially Polarized Voting in North Carolina (June 14, 2011) 971

TABLE OF CONTENTS—Continued

Page

D-5.11 - Joint Statement by NC Sen. Rob Rucho and NC Rep. David Lewis (June 17, 2011)..... 1024

D-8 - Laura Leslie, Butterfield disputes chairs' statement, WRAL.com (July 5, 2011)..... 1062

D-14 –Letter from NC Sen. Rucho and NC Rep. Lewis to Hon. Floyd McKissick re: redistricting criteria and legal issues (May 17, 2011)..... 1066

D-15 – Letter to NC Sen. Rucho and NC Rep. Lewis from Michael Crowell and Bob Joyce, UNC School of Government (May 27, 2011)..... 1072

D-25.8 - Rebuttal Expert Report of Thomas B. Hofeller, U.S. District Court for North Carolina Middle District (January 17, 2014)..... 1092

D-25.10 – Report of Stephen Ansolabehere in Response to Thomas B. Hofeller Rebuttal (January 29, 2014)..... 1121

D-26.1 - Second Expert Report of Thomas B. Hofeller, U.S. District Court for North Carolina Middle District (June 4, 2015)..... 1136

D-27 - Letter from U.S. Rep. Mel Watt to NC Sen. Rucho and NC. Rep. Lewis re: Statement Regarding Proposed VRA Districts (July 8, 2011)..... 1193

TABLE OF CONTENTS—Continued

Page

VOLUME IV

D-31 - Transcript of Dickson v. Rucho Bench Trial (June 4, 2013), Vol. I 1196

Opening Statement:
Plaintiffs 1204
Defendants 1206

Testimony of Sen. Daniel Blue:
Direct Examination 1210
Cross Examination 1227
Cross Examination 1240

Testimony of Eric Mansfield:
Direct Examination 1240
Cross Examination 1252
Redirect Examination 1255
Recross Examination 1257

Testimony of Albert Kirby:
Direct Examination 1258
Cross Examination 1264

Testimony of Rep. Larry Dwight Hall:
Direct Examination 1266
Cross Examination 1285
Cross Examination 1288
Redirect Examination 1293

Testimony of Walter Rogers:
Direct Examination 1294
Cross Examination 1302
Cross Examination 1304

TABLE OF CONTENTS—Continued

Page

Testimony of Goldie Frinks Wells:
Direct Examination 1307
Cross Examination 1319

Testimony of Linda Garrou
Direct Examination 1323

Testimony of Congressman Melvin Watt:
Direct Examination 1331
Cross Examination 1353
Cross Examination 1358
Redirect Examination 1367
Recross Examination 1370

VOLUME V

D-31 - Transcript of Dickson v. Rucho Bench Trial (June 5, 2013), Vol. II 1590

Testimony of Thomas Brooks Hofeller:
Direct Examination 1595
Cross Examination 1646
Cross Examination 1686

Testimony of Ruth Samuelson:
Direct Examination 1696
Cross Examination 1699

Testimony of Sen. Robert Rucho:
Direct Examination 1701
Cross Examination 1703

Testimony of Allan J. Lichtman:
Direct Examination 1708
Cross Examination 1741

TABLE OF CONTENTS—Continued

Page

VOLUME VI

D-58 - Affidavit of Thomas L. Brunell (Dickson v. Rucho), Superior Court of Wake County, North Carolina (December 10, 2012) 1961

D-61 - Judgment and Memorandum of Decision, (Dickson v. Rucho), Superior Court of Wake County, North Carolina (July 8, 2013) 1969

D-62 – Appendix to the Judgment and Memorandum of Decision (Dickson v. Rucho), Superior Court of Wake County, North Carolina (July 8, 2013) 2054

D-72 - Deposition Erika Churchill Excerpts (Dickson v. Rucho), Superior Court of Wake County, North Carolina (May 20, 2012) 2162

D-90A - Affidavit of Erika Churchill (Dickson v. Rucho), Superior Court of Wake County, North Carolina (December 19, 2012) 2208

D-100 - NC House of Representatives Session Transcript of the Proceedings 7.22.11 (6:00pm) 2248

Transcript - Harris v. McCrory Bench Trial, U.S. District Court for North Carolina Middle District (October 13, 2015), Vol. I ... 2278

Testimony of Sen. Daniel Blue:
Direct Examination 2310
Cross Examination 2330

TABLE OF CONTENTS—Continued

Page

Testimony of Congressman Melvin Watt:
Direct Examination 2361
Cross Examination 2373
Redirect Examination 2408

VOLUME VII

Testimony of G.K. Butterfield:
Direct Examination 2411
Cross Examination 2418
Redirect Examination 2444
Recross Examination 2446

Testimony of David Peterson:
Direct Examination 2448
Cross Examination 2469
Redirect Examination 2486

Transcript - Harris v. McCrory Bench Trial. U.S. District Court for North Carolina Middle District (October 14, 2015), Vol. II 2490

Testimony of Stephen Ansolabehere:
Direct Examination 2493
Cross Examination 2553
Redirect Examination 2627
Recross Examination 2631

Testimony of Dan Frey:
Direct Examination 2639
Cross Examination 2664

Testimony of Thomas Brooks Hofeller:
Direct Examination 2671

TABLE OF CONTENTS—Continued

Page

Transcript - Harris v. McCrory Bench Trial. U.S. District Court for North Carolina Middle District (October 15, 2015), Vol. III 2707

Testimony of Thomas Brooks Hofeller 2713
Direct Examination cont. 2713
Cross Examination 2755
Redirect Examination 2834

Rebuttal Witness Stephen Daniel Ansolabehere 2856
Direct Examination 2856
Cross Examination 2857

[156] G.K. BUTTERFIELD,

PLAINTIFF'S WITNESS SWORN AT 2:48 p.m.

DIRECT EXAMINATION

BY MR. SPEAS:

Q Would you state your name for the record, please.

A GK Butterfield. The G is for George, the K for Kenneth.

Q Would you tell the Court a little bit about where you grew up and where you went to school?

A I'm a native of Wilson, North Carolina, born in 1947, and went to the public schools there in my home community, both elementary and high school. Graduated from high school in 1965.

During those years, I was very active in what we now refer to as the Civil Rights Movement, as was my father before me. After high school, I went on to North Carolina College at Durham, later to become known as North Carolina Central University.

After my third year in college, I was drafted into the US Army. I served two years in the Army, discharged from the Army in 1970, and returned to Durham to complete my undergraduate work, and then went on to the law school there at North Carolina Central University, graduating in 1974.

Did not pass the bar exam in 1974. I worked for a law firm in Warren County called Clayton & Ballance. And the following year, 1975, I took the bar exam and passed it and was [157] admitted to the practice of law.

Q Tell us a little bit about your legal career.

A Well, my legal career, in earnest, started in 1975, even though I had one year working with a law

firm prior to that as a lawyer in a small town with another lawyer, lifelong friend named Milton F. Fitch, Jr. now Superior Court Judge Fitch.

The two of us started – and Quentin Sumner, who is also a Superior Court Judge, we started a law firm known as Fitch, Butterfield & Sumner. And we continued under that arrangement for several years.

After that, Judge Sumner withdrew from the firm and started his own firm with his spouse, and Milton Fitch and I continued the law practice. And later, a man named James A. Wynn, Jr. joined the law firm to be known as Fitch, Butterfield & Wynn. I continued to practice law until I was elected to the bench some years later.

Q Okay. And you served on the North Carolina Superior Court bench?

A I did serve on the bench. Prior to getting elected as a superior – resident Superior Court Judge, I was a typical small-town lawyer. In the early years, I handled the speeding tickets and the misdemeanor district court cases and the like, and then graduated and became a personal injury lawyer. And I began to do some probate work, and enjoyed that very much.

And then, in 1982, the US Supreme Court changed [158] the – what is required for a Section 2 violation from the intent standard to the results, or effects, standard. And so I developed an interest in voting rights litigation, primarily because my father, in 1957, had become the victim of a miscarriage of justice when he served on the Board of Aldermen in my hometown.

While my family was on vacation in March of 1957, the City Council abruptly changed the method of election from district elections to at-large election. And my dad had been the first African-American to serve

on the board in its history. And when we returned from our vacation, we found that the method of election had been changed, and he was soundly defeated in 1957. I was 10 years of age and remember it very vividly. And there was a challenge to the election system.

Also, there was a provision enacted that prohibited single-shot voting. So not only did it dissolve a district election system, but it also created a requirement, a full slate requirement which prevented single-shot voting. And that really angered the African-American community, as you can imagine.

In 1959, another gentleman in the community ran, my pastor, and he was soundly defeated in 1959. And at that point, the NAACP took the litigation. And the case went to the US Supreme Court – well, the Supreme Court denied cert in the case, but it was lost at every level.

[159] And so, as a young – impressionable young man, I noticed all of this and didn't quite fully understand it, but that forced me to want to not only become a lawyer, but to go into the political arena. And so, my law practice evolved into a voting rights practice because I wanted to try to remedy some of the past miscarriages of justice. So I did voting rights litigation for some years.

The legislature created, as a result of litigation under the Voting Rights Act, eight opportunity districts for black lawyers to get elected to the Superior Court bench. It was settled; it was not a verdict by the Court. It was settled by the legislature, and eight seats were created – eight opportunities were created across the state. And I ran in one of those districts in 1988 and was elected and sworn into office as resident Superior Court Judge January 1st of 1989,

and served the next 11 years as a Superior Court Judge.

In 2001, Governor Easley appointed me to the State Supreme Court. I. Beverly Lake, Jr., had defeated Chief Justice Henry Frye in the election of 2000, thereby creating a vacancy. When Lake moved from Seat 7 to Seat 1, there was a vacancy in Seat No. 7, and Governor Easley, one of his first acts as governor was to appoint me to the State Supreme Court.

I stayed on the Court for nearly two years, and I was defeated in the November 2002 election because we, as you certainly recall, had partisan election judges. And even [160] though my opponent was not known and did not do any fundraising, did not do very much campaigning, he beat me by a margin of 50 to 48 because of the straight ticket voting for then candidate Elizabeth Dole.

And so, after serving nearly two years on the Supreme Court, Governor Easley re-appointed me, this time as a Special Superior Court Judge, and that's where I stayed until I was elected to Congress.

Q And you first ran for Congress in 2004?

A I ran in 2004 in a Special Election. Around March of 2004, my predecessor in this office announced he was not running for re-election, and then two weeks later announced that he was actually vacating the seat. That created a vacancy for the House. There had to be a Special Election under the law, and Governor Easley set both the regular primary and the election for the remainder of the term, two elections on the same ballot on the same day. It was a little confusing. But I was elected on July 20th of 2004 and continue in that position today.

Q And you have been re-elected to Congress in 2006, 2008, 2010, 2012, and 2014?

A That is correct.

Q Okay. Tell the Court a little bit about your work in Congress.

A Well, believe it or not, I'm now considered a senior [161] member of Congress. There's been a tremendous turnover in the last 10 years. I went in as Member No. 435, and now I'm No. 140 in order of seniority in the House on the Democratic Side. I am a Democrat. On the Democratic side, I am a Chief Deputy Whip of the House Democratic Caucus, and I'm also honored to be the chairman – as was Congressman Mel Watt some years ago, Chairman of the Congressional Black Caucus.

Q Okay. Now –

A And served on the Energy & Commerce Committee in the House of Representatives.

Q Now, let's turn just a few minutes to the districts from which you were elected prior to the 2011 redistricting that is at issue here. Do you recall the approximate African-American voting-age population in your district from 2004 through the 2010 election?

A It was in the 47 percent range, I believe.

Q Okay.

A Forty-seven, yes.

Q And like Representative Watt, do you remember your margins of victory in those districts?

A They were comfortable margins of victory, and I can refer to the documentation to give you the exact margins.

Q If you would, please.

A Yes. In 2004, 63.88 percent. I was unopposed in 2006.

In 2008, 70.28 percent. In 2010, 59.31 percent. That was my [162] lowest tabulation in all of my years. In 2012, 75, that was after the new map went into effect, 75.32. And in 2014, 73.38 percent.

Q Okay. Let's talk about the redrawing of Congressional 1 in 2011. What were the differences in the district from 2010 until redrawn in terms of the percentage of African-American voters?

A Well, I was expecting an insignificant change. I knew we had to pick up 97,500 new citizens in the district. I was aware of that. But I thought it could be done without much disruption to the core district that I was familiar with. And that's what my expectation was.

Q Okay. And did the new district divide more counties than the prior – did the new plan divide more counties than the prior plan?

A Well, in the prior district – I said this in all of my speeches until I – and I remember it so well, 23 district – 23 counties in the district, 13 whole counties, 10 parts of counties. That was the division between whole and parts of counties.

And after the redrawing of the districts, I only had five whole counties out of 24, 19 portions of counties.

Q So the present district is composed of five whole counties and 19 pieces of counties?

A Five out of 24 counties are whole counties.

* * *

[174] severity of the polarization.

And what needs to also be a part of this conversation is what region of the state are you addressing the polarization question, because no one size fits all.

Q Is Charlotte different than Wilson?

A I was listening to Senator Blue's testimony today, and there's no resemblance between voting behavior among white citizens east of Interstate 95 as opposed to the urban areas of Wake and Mecklenburg County. It's regrettable, but that is a fact.

Q In Eastern North Carolina, what is your judgment as to the level of white voting?

A My judgment is not scientific, Mr. Speas.

Q I understand.

A But it is based on 40-plus years of direct voter participation. I round it off just for discussion purposes. I would say that most African-American candidates – and there are exceptions. Most African-American candidates and most candidates who are the choice of the African-American community generally can never depend on two out of three white voters. In other words, 66 percent of white voters, in my opinion, will never vote for an African-American candidate for most positions.

And as I said, there have been exceptions, and I acknowledge that. But the converse of that is also true. [175] About 33 to 35 percent of white voters will vote for a qualified candidate who is African-American or the choice of the African-American community if they prove their metal.

MR. SPEAS: Okay. Thank you very much, Congressman Butterfield. I have no more questions at this point.

THE COURT: Cross-examination?

MR. PETERS: Thank you, Your Honor.

Good afternoon, Congressman Butterfield. My name's Alec Peters. I'm with the North Carolina Attorney General's Office. And I do have a few questions for you.

CROSS-EXAMINATION

BY MR. PETERS:

Q First, I noted that you took some notes up with you to the stand. And may I ask you what it was you took up with you?

A You can. It's a table that I had personally typed in my office just for reference purposes, and you're certainly welcome to view it.

I have my black voter age population figures both before and after 2011. I have the dates on which I met with Senator Rucho, and I have some what we call in Washington talking points, one size fits all. Minority percentages don't make sense. The other is polarized voting is severe in Eastern North Carolina.

The other talking point, and maybe that's not a good way to describe it. The other point is two out of three white [176] voters will not vote for the choice of the African-American community.

The next point is only one of three white voters will consider voting for an African-American candidate.

And the other is basically a restatement of the law, which says when race is a predominant factor, then the remedy must be narrowly tailored.

And then I have 13 whole counties and five whole counties. And then I have the names of three judges so I would not get in trouble with the Court.

MR. SPEAS: Thank you, Congressman. I'll ask plaintiff's counsel if we can have a copy of that provided to us, please?

THE WITNESS: Certainly, you can.

THE COURT: I'm sorry.

MR. SPEAS: May I approach the witness? Would you like to view it now?

MR. PETERS: Sure. Let me look at it now.

THE WITNESS: And Mr. Peters, I have your name up here as well.

MR. SPEAS: May I approach?

THE COURT: You may.

BY MR. PETERS:

Q Congressman Butterfield, I want to thank you for letting me look at that because there were a couple of times my hand [177] was not keeping up with me as I tried to take notes, and you've helped me out.

You testified, I believe, earlier about the margins of victory in your various races. And I believe I wrote down that in 2004, it was around – I'm going to round here – 63 percent?

A Yes.

Q And in 2006, you were unopposed?

A Yes.

Q All right. In 2008, it was over 70 percent; is that correct?

A Yes.

Q And then in 2010, it was 59?

A Yes.

Q Then in 2012, over 75 percent?

A Yes.

Q In 2014, it was just over 73 percent?

A Correct, right.

Q So of the five elections in which you had an opponent, three of them had a margin of over 70 percent; is that correct?

A Three of the five had margins greater than – yes, greater than 70 percent.

Q All right. And one of those was under the 2001 Plan, wasn't it, not under the 2011 Plan?

A That is correct – no, that is not correct. Ask the [178] question again.

Q One of those margins of victory that was over 70 percent, the one in 2008, would have been under the 2001 Congressional District –

A That's correct.

Q – Congressional Plan; correct?

A Yes.

Q Okay. Thank you. One other thing I wanted to pick up on, you mentioned – and you may have answered this, but I want to make sure it's clear.

You said you had heard that there might be some discussion about drawing the 1st District into Guilford County?

A Yes.

Q Do you remember who you heard that from?

A I don't. It was a member of the legislature, I would guess a member of the State Senate. So it would

have either been Senator Ed Jones or Senator McKissick, probably one of those two, yes.

Q And I believe you said you did discuss that with Senator Rucho –

A Yes.

Q – when you met? And his – excuse me. Go ahead.

A He dismissed it when I brought it up, yes.

Q All right. When you say he dismissed it –

A He acknowledged – he acknowledged that it had been a [179] conversation, but I got the impression that it was not likely to happen.

Q Thank you.

A Yes.

Q Now, you commented that you were careful, based on Ms. Williams' advice, not to state a preference for Wake or Durham County when you were meeting with Senator Rucho and Representative Lewis; did I get that right?

A That is correct.

Q And why was it you didn't want to state a preference?

A Two reasons. One was political. I did not want the voters of the county that I did not choose to feel that they would be unwanted, you know, in a district that I would represent.

Secondly, because I know how litigation works. I spent 30 years in a courtroom, and I know how it works. And I know the less you say, the better you are.

Q Would I be correct in saying you didn't want to say something you would be unhappy to hear repeated back, say, in court today?

A Yes.

Q All right. Let me ask you to look at the white notebook that Mr. Speas had you looking at. Behind the tab with your name on it, there's a tab that says 19?

A Yes.

[180] Q Do you see that?

A I do.

Q And that's the letter that you wrote to Senator Rucho and Representative Lewis; correct?

A It is.

Q And it's marked down at the bottom left-hand corner Defendant's Exhibit 19?

A Yes.

Q All right. Let me ask you a few questions about that. Let me ask you to look at the second paragraph, which – let me just ask you to read the first sentence of the second paragraph.

A Yes, and this is refreshing my memory. I'm glad you directed my attention to this.

Quote: "It is regrettable that you would use the Voting Rights Act and my objection to the removal of Gates, Washington, Beaufort, Craven, Jones, and Wayne Counties to justify wholesale changes to the proposed congressional map."

Should I continue?

Q That's fine. Thank you.

A Yes.

Q Why were you objecting to the removal of Gates, Washington, Beaufort, Craven, Jones, and Wayne Counties?

A I felt it was unnecessary. It was too much of a radical change to the core district that I knew so well.

[181] Secondly, these were Section 5 counties that I believe needed the protection of and the ability to elect a member of Congress of their choosing. And I just thought that it was absolutely unnecessary to take these counties out of the mix when there were many other ways that a legal district could have been configured.

Q Why did the fact that they were Section 5 counties make you think they should be kept part of District 1?

A Because Section 5 counties, by definition, are counties that have histories of voter discrimination and disenfranchisement. And we have been trying to remedy past discrimination in Section 5 counties – all counties, but particularly all the Section 5 counties for generations. And to see those counties just absolutely removed from a majority minority district and submerged into the adjoining district, I felt, was unneeded, unnecessary, and unfair to the citizens of those counties.

Q All right. Were any of those counties or portions of any of those counties put back in District 1 by the time the district was actually enacted?

A Yes, all except Jones County.

Q All except Jones?

A Yes.

Q So Gates – at least a portion of Gates, Washington,

Beaufort, Craven, and Wayne were put back in your district?

[182] A Well, we call the Gates County area the Albemarle region.

The counties in the Albemarle region are Gates, Chowan, Perquimans, and Pasquotank. And, traditionally, I have always represented those four counties. My two predecessors have likewise represented those four.

And so, even though these four were in the final map, only the black communities of these four counties were in the final map. The white communities were – and the more Republican-leaning communities were excluded from the final map. And that was very confusing to me why the map drawers would actually go into the Albemarle region and just cherrypick African-American communities and leave those in my district, and to allow the remaining communities to go into the 3rd Congressional District. It was very hard to comprehend.

In fact, I even drew a map of it just for my own edification over the weekend. And as I look at it today, it just makes no sense to me at all. I look at Beaufort County, for example. I have represented six precincts – six voting precincts in Beaufort County, which is the town of Washington, Your Honors, as the county seat. And now I've been reduced from six precincts to three precincts, and those are the African-American precincts in the town of Washington. And it's obvious to me that this is partisan, racially motivated gerrymandering, and it's offensive. It's offensive to me. It's offensive to the people that I represent.

[183] Q Thank you. But I believe my question was, am I correct that the enacted version of Congressional District 1 does include a portion of Gates, Washington, Beaufort, Craven, and Wayne Counties?

A You didn't use "portion" in your first question.

Q If I didn't, that was my mistake.

A You did not. That's why I went through all the lengthy explanation. But yes, that is true.

Q Thank you.

A Yes.

Q And the first iteration of the Congressional Plan and the final iteration of the Congressional Plan that was enacted does include portions of Chowan, Perquimans, Pasquotank?

A Portions. And I will again repeat those portions are predominantly – overwhelmingly African-American communities.

Q In your letter of July 22nd, you did not say anything about Chowan, Perquimans, or Pasquotank; did you?

A I did not, no.

Q Thank you. And, now, in the first iteration of the Congressional District, it's correct, isn't it, that your – the 1st Congressional District was drawn into Wake County?

A Wake County? Yes, sir.

Q Yes, sir.

A That is correct.

Q And I believe you said you were looking at the map, trying [184] to figure out where St. Augustine's and Shaw would be in that?

A Yes.

Q But the version that was enacted went into Durham County rather than Wake County; is that right?

A That is correct.

Q All right. And the original version of the 1st District enacted in 1991 also went into Durham County, didn't it, or do you recall?

A You're taking me back a long ways. I don't think so. I think District 12 went into Durham County, and District 1 went into New Hanover County.

Q Let me see if this helps a little bit, Congressman. You should have a black notebook up there that on the front says, "Historical Congressional Maps 1991 to 2011."

A Yes.

Q And there's an exhibit sticker down at the bottom, Defendant's Exhibit 126. And let me ask you to look at district – at Tab 1, which is taken from the submission for the 1991 Congressional Plan. If you look at the third page of that, you can see a closeup of District 1.

A I do now recall, Counselor. I do now recall. It did go into Durham.

Q Thank you.

A Because Ken Spaulding and Mickey Michaux ran for Congress, I believe.

[185] Q Thank you. Now, looking back at your letter –

A No, I stand corrected on that. Michaux and Spaulding ran pre-'91. So please continue your line. I'm trying to refresh my memory. Yes.

Q That's fine. I realize it was sometime ago.

A Yes.

Q Looking back at your letter, in that second paragraph, the last sentence reads:

Additionally, the amended plan – let me, before I start. Do you have that letter back in front of you?

A Yes.

Q The last sentence reads:

Additionally, the amended plan unnecessarily, quote, "packs," closed quote, new African-American voters from counties not covered by Section 5 of the Voting Rights Act into District 1.

Did I read that correctly?

A No. Are we still on the July 22nd letter?

Q Yes, sir, the second paragraph, the last sentence of the second paragraph.

A The last sentence of the second paragraph.

Q I'm sorry.

A All right. Additionally – I'm with you, yes.

Q In that sentence, what do you mean by the word "packs"?

A To pack a community, to me, means to encompass a voting [186] bloc of people and to unnecessarily attach those people to another community to achieve a goal that is not mandated by law or necessary.

Q So in your understanding, does the term "pack" have anything to do with how many people are included in the district, whether it's a supermajority or a bare majority?

A There are degrees of packing, certainly. But any time you have a district that's already 47 percent African-American, and continuously, for more than a decade, has elected a candidate who is the choice of the African-American community, to then scoop up additional communities of African-American voters, and to add those voters to the existing majority minority district, is – meets the definition, in my view, of "packing." It's putting too many into a community in order to achieve a result.

Q All right. Looking a little further down in this letter, and this has been mentioned earlier today, it's correct, isn't it, that as of the 2010 Census, the 1st Congressional District was underpopulated by over 97,000 people?

A That is accurate.

Q Do you have a sense, based on your knowledge of Eastern North Carolina, how that came to be why the 1st Congressional District came to be so underpopulated compared to, say, the 12th that I believe Congressman Watt testified earlier was overpopulated by just a couple thousand?

A I think I know. North Carolina has been allocated 13 [187] representatives based on the census, and that went unchanged after the 2010 Census. But in the meantime, the population of our state increased to 9 million people, which was about 1-1/2 million people more than the prior decade. And so, by definition, the districts had to increase in ideal size.

And, at the same time, concurrent with that was a loss of population in rural communities. And so the growth of the state coupled with the loss of population in rural communities resulted in a 97,500-person deficit. And I recognized that clearly when we had

these conversations. I knew we had to find 90-plus-thousand people.

Q Right. Now, going back to the margins of error that you mentioned – excuse me – the margins of victory that you mentioned in your elections, in 2008, when you had a margin of receiving 70.28 percent of the vote, I think is what I have written down, and would I be correct that that means your opponent received 29 point –

A Seventy-two.

Q – 72 percent of the votes?

A Yes, sir.

Q Right. Do you know what that translates into in numbers?

A Oh, I would have to use pencil and paper to figure that out. Probably between 250 and 300,000 votes, I suppose. There's 730,000 people in the district. Probably 300,000 are registered voters – 300-plus-thousand are registered voters. [188] And so 10 percent would be – it probably says that my opponent probably received 80 or 90,000 votes.

Q Compared to your –

A Well in excess of 100,000.

Q Okay. Do you know if that margin was more or less – the 97,500 more or less than the amount by which the district had become underpopulated? And if you don't know that –

A I'm doing the math. I'm doing the math, yes. I don't know.

Q All right. Thank you.

A I don't want to guess at it. I don't know.

Q All right. Thank you.

A Yeah.

Q I believe you testified earlier that the African-American population of the district as it existed in the 2000s, so in other words, the 2001 Congressional District after the 2000 Census, I believe you testified that was around 47 percent?

A My records show 47.66.

Q Do you recall whether that is total black population,

voting-age population, or –

A Eighteen and over voting-age population.

Q Do you recall whether it is total black or single-race black, people who – do you – I'll put it a different way. Do you recall whether that is limited only to the people who identified themselves on the census as being black, [189] or does it also include the people who identified themselves as being part black?

A I know what you're asking, and I don't know. I've seen these cross-tabs on the census data, and I don't know if BVAP also includes these multiple categories. I don't know.

Q All right. And that was – that 47 percent was under the 2000 Census; is that correct?

A Correct.

Q Would you agree that the census is a snapshot of what a population looks like as of the time it's taken?

A Yes, they do. The American Community Surveys, you know, during the midterm –

Q Right.

A – and for that very reason.

Q All right.

A Yes.

Q Let me ask you to pull out the black notebook again, which is Defendant's Exhibit 126. And let me ask you to look at Tab 5.

A All right, sir.

Q And do you see that that says, Congress Zero Deviation?

A Yes, sir.

Q Do you recall whether or not that was the name of the 2001 Congressional Plan?

A Yes, it is.

[190] Q All right. And that's marked as Defendant's Exhibit 4.4A up in the upper right corner of that map?

A Yes.

Q Let me ask you to turn a few pages back to the page that at the top says, voting-age population by race?

A You said "back." Do you mean forward or back?

Q It would be behind that map, and it's going to be one, two, three, four pages behind that map.

A The map that I'm looking at is the first document under Tab 5.

Q Correct.

A So it would be after the map?

Q After that map, yes, sir.

A After the map, I see Exhibit 4, which is the fourth affidavit of Dan Frey.

Q Right. Then go three more pages behind that.

A Yes, sir.

Q And you should see one that says, district attributes, Congress Zero Deviation, voting-age pop by race.

A I have it.

Q All right. And do you see where District 1 is noted in the left-hand margin?

A Yes.

Q And if you go over three columns, do you see the one that says, VA: black?

[191] A Yes.

Q And what does it note for the percentage for District 1 in that column? And I realize some of these numbers are small.

A They are, and the copies are not as clear as they probably could be. It appears – I'm going to go across with you. I'm seeing District 1, total is 457,936. VA white is 223,452. Black is 218,732. Native would be 3,273. And then I guess Asian/Pacific Islanders would be the next, 2370. I don't see a percentage.

Q If you look at the line under that, you see that number translated into a percent?

A I do. 47.76 percent.

Q Is that the 47 percent number you've been talking about?

A Absolutely.

Q Now, if you look over in the last column, do you see VA: multi-race?

A Yes.

Q And what's the number and the percentage there?

A .71 percent, less than 1 percent.

Q All right. Now, let me ask you to look at Tab 6, which is Defendant's Exhibit 4.5A. And I'll represent to you this is the same map but with data based on the 2010 Census. And I'm afraid these numbers are going to get even smaller.

If you look one page behind that map, you'll see it says, Exhibit 5, fourth affidavit of Dan Frey, Congress Zero [192] Deviation 2010 Census. And that's Defendant's Exhibit 4.5?

A Yes.

Q All right. Now, let me ask you to go to two sheets behind that, and you'll have to turn the page sideways. And do you see a page that says, stat pack report of total population by race and ethnicity, Congress Zero Deviation?

A Yes.

Q And do you see the column and line for District 1?

A Yes.

Q All right. Now, let me ask you to follow that line over to the column that says, percent black. And can you tell me what that number is?

A 49.65 percent.

Q All right. Now, let me ask you to keep going.

THE COURT: Hold on just a second. I'm not sure we're on the right page. Down at the bottom of the page on the CM/ECF filings –

MR. PETERS: Yes, sir.

THE COURT: – 28 of 45, what page are you on?

MR. PETERS: It says 27 of 45.

THE COURT: You said that was 49.65? Okay. And you may continue.

BY MR. PETERS:

Q Now, let me ask you to keep going over to – do you see a column that says, (MR) black?

[193] A Yes, sir.

Q All right. And what is that percentage?

A 1.00 percent.

Q All right. And if you go over two more columns, do you see a column that says, total percent black?

A Yes, sir, 50.65 percent.

Q All right. Now, let me ask you to look at the next page. And this would be the one I think Judge Osteen was on a minute ago, 28 out of 45. And we'll look at the same things.

Do you see in the line for District 1 a column that says, percent black?

A Yes, sir.

Q And what does it say?

A 48.07 percent.

Q All right. Do you see a column a ways down that says, percent multi-race black?

A Yes, sir, 1.04 percent. Yes, that is correct. "MR" means multi-race, yes.

Q All right. Keep going two more columns, and you'll see one that says –

A Multi-race black, yes.

Q Right. And what is that number?

A It appears to be .56 percent, less than 1 percent.

Q And then two more columns, do you see, total percent black?

[194] A Yes, sir.

Q And can you read that?

A 48.83 percent.

Q So, at least based on this – these numbers from the 2010 Census, the voting-age population of District 1 had actually gone up – the black proportion of the voting-age population in District 1 had gone up since 2000; had it not?

A That's what this document reveals, and it seems reasonable that that would be correct.

Q Now, let me ask you to look at the next page where it says, Stat Pack Report of Voter Registration by Party and Race, Congress Zero Deviation. Do you see that?

A Yes.

Q And I'm going to just ask you to look for the line for District 1, and then look all the way over in the last block of columns where it says, Registration by Race Without Regard to Party.

A Yes, sir.

Q And do you see the percent black figure given there?

A It's a smudgy copy, but I'm going to say that it appears to be 50 – 50.66 percent.

Q That's what it appears to be to me as well. I agree it's not an ideal copy. But – so based on these numbers, according to this data, the majority of the

registered voters in District 1 as of the 2000 Census were African-American – identified as [195] African-American; is that correct?

A Yes, as of 2011.

Q Now, let me ask you, are you familiar with how the census counts Hispanics in – when it does its counting?

A I know the US Census Bureau makes a very deliberate effort to try to accurately take the count, and I know there are various methodologies that are used. I know there's a lot of advertising in Hispanic communities to encourage an accurate count, and I know the census enumerators literally go into the communities, knock on the doors, and do everything within their power to get an accurate number.

Q What I was – I didn't – I don't think I phrased that particularly well.

Are you aware whether, in the census, a distinction is drawn between race and ethnicity?

A Yes.

Q And what is that distinction as you understand it?

A I'm not sure I fully understand it because it has evolved over the years. But ethnicity would be a description of the individual's heritage or lineage and how the person self-identifies. And so, if a person identifies as black, obviously, the ethnicity would be African-American. If they identify as mixed race or a – I forgot the categories, but there are two or three different categories. But I think all of these are lumped into one category of ethnicity being [196] African-American.

Q All right. Do you – well, let me try it this way. If you still have the notebook in front of you, the one with the plans in it. And we were on the page that at the bottom says page 29 of 45.

A Yes.

Q And the next page would be page 30 of 45.

A Yes.

Q And at the top, it says, Stat Pack Report of Voter Registration by Gender, Age, and Ethnicity. Do you see that?

A Yes.

Q And if you look at the last column there, do you see it makes a distinction, simply, Voter Registration By Ethnicity; it makes a distinction between Hispanic and non-Hispanic?

A Yes.

Q Let me ask you to turn back forward to the page that at the bottom is marked page 27 of 45.

A I'm there.

Q All right. Look at the very last column there – well, the last two columns. And do you see columns that say, white, non-Hispanic, and percent white non-Hispanic?

A Yes.

Q In that last column, percent white non-Hispanic, what's the number there?

A 270,686.

[197] Q And what's the percentage?

A 42.58 or either 56.

Q All right. And if you look back at the beginning, the early columns in that, where you see white and percent white?

A Yes.

Q The total percentage of white there is shown as 44.19 percent; isn't it?

A That is correct.

Q But of those, according to this chart at least, 42.58 percent are non-Hispanic whites.

A That is correct. I suppose because some Hispanics identify as white and some don't.

Q Right.

A Yes.

Q And by the same token, some blacks could identify as Hispanic, and some others might not; is that correct?

A There may be incidence of that, but probably less prevalent as opposed to the other way.

Q And again, on page 28, the one that says 28 of 45, which is the next page. If you look in the column that says, percent white, for District 1, it says 46.92 percent; is that correct? The column that just says, percent white.

A Percent white is 46.92 percent.

Q Right.

A Yeah.

[198] Q And if you look at the very last column, the percent white non-Hispanic is 45.59 –

A That is correct.

Q – is that correct? Excuse me one second, Your Honor.

Congressman, let me ask you to look at that page again, the one that's 28 of 45. And I just want to make sure this is clear for the record. Up at the top of that page, does it say it's voting-age population by race and ethnicity?

A Yes. The header says, report – Pack Report of Voting-Age Population By Race and Ethnicity.

Q And the page ahead of it, the one that at the bottom says 27 of 45, that one is headed, Stat Pack Report of Total Population By Race and Ethnicity.

A Yes. Page 27 of 45 is delineated as total population, and 28 is delineated as voting-age population.

Q Now, Congressman Butterfield, Mr. Speas asked you some questions about voting in Northeastern North Carolina, and I think you kind of shorthanded it as east of I-95, what the voting patterns would be, and comparing it to what Senator Blue had testified to this morning.

Is it your testimony that racially polarized voting still exists in many places east of I-95?

A It does. When I did voting rights litigation, it was extremely severe, and there were numerous studies conducted that were accepted by the Court that concluded that with the [199] racially polarized voting as it existed then, with multi-member districts for the state legislature, that it was nearly impossible – I think the Court may have said 1 out of 100,000, that was the *Gingles* Court, Judge Phillips presiding, 1 out of 100,000 chances of being elected.

And so, as recently as 30 years ago, voting was so polarized that it was nearly impossible for the preferred candidate to get elected. That has improved over the years. But I still believe that two out of three white voters in Eastern North Carolina, particularly in Northeastern North Carolina, which I feel that I'm expert enough to testify regarding because I've been there all of my life, have been into every town, village and hamlet and crossroads in Northeastern North Carolina, know thousands of people. I firmly believe that the preferred candidate of the African-American community probably can expect to get one out of – if qualified, and we all have different definitions of "qualification," but I think we can probably agree on what "qualification" means, that a qualified – a qualified candidate who is the preferred candidate of the African-American community, for planning purposes or for strategic purposes, can count on getting one out of three white votes in Northeastern North Carolina.

And that means that two out of three will probably not vote for that candidate. There have been exceptions, I'm [200] proud to report.

Q So just so I'm clear, though, it is your belief that racially polarized voting still exists –

A It still exists without question.

Q – in Northeastern North Carolina? I'm sorry?

A It still does exist without question.

Q All right. Did you believe it was necessary, in drawing the 1st District, to maintain an African-American population sufficiently high to ensure that African-Americans could elect their candidate of choice?

A I think it was important that the legislature look at voting behavior and past electoral success and failures to determine what is the appropriate level of minority – of African-American voter registration and voting-age population in order to level the playing field to give the preferred candidate an equal opportunity to get elected. And I don't believe that an unofficial number, such as greater than 50 percent, is suitable because it should be area specific, maybe not county specific, but certainly regional – region specific, because what – the coalition politics of Mecklenburg and Wake County unfortunately don't exist in Northeastern North Carolina.

And so, the preferred candidate, usually the African-American candidate, must go out and walk the delicate balance between the interests of the white community and the [201] interests of the African-American community, and that's very difficult.

Q And I believe your testimony has been that you believed that the 47.76 percent African – white voting-age population accomplished what you're describing?

A Without question. Not just for me personally, and I continue to tell anyone who's willing to listen this – listen to this. It's not about my electability, because I am unique, if I must say that about myself, because I've been out there in the trenches for 45 years, served as a judge in most of the counties that I now represent in Congress. And so, I have some political advantages that other candidates probably will not have in the future.

And so, while I'm concerned about my own electoral success, I'm also concerned about the success of those who follow me. And I believe that 47 percent is a suitable number that in a qualified candidate who is

the choice of the African-American community can be competitive in the 1st Congressional District.

Q Do you believe a suitably qualified African-American candidate in the 1st District who is the candidate of choice of African-American voters could be elected if the black voting-age population was reduced from 47.76 percent?

A Conceivably, yes.

Q How far do you think it could be reduced?

[202] A I wouldn't take it below 45.

Q So you think if it went under 45, then that would call –

A I think the playing field is level at 47. I think at 46, it gets to be a little bit more difficult; 45, it gets more difficult, but still competitive. And I think the law should just guarantee the ability to compete fairly, and so, I feel most comfortable with 47.

Q All right. And do you have an understanding of whether the 1st Congressional District – well, let me approach it this way.

Let me ask you to look one more time at the white notebook, Tab 19 behind your name, the third paragraph that begins at the bottom of page 1 with the words, "from the beginning..."

A Yes, sir.

Q Could you read that first sentence, please.

A Okay. Quote: "From the beginning, I simply ask that you start with my current district and add 97,500 people to comply with one person, one vote requirements in a manner that would comply with the Voting Rights Act."

Q And when you say "in a manner that would comply with the Voting Rights Act," which parts of the Voting Rights Act were you – did you have in mind?

A Section 2, principally, that is, that the minority – that the African-American vote not be diluted to such an extent that [203] the vote – the voters would be unable to influence the outcome of an election.

Q And it's true, isn't it, that District 1 was initially drawn to comply with Section 2 of the Voting Rights Act?

A It was. I remember it very well.

Q Despite the fact that it also happens to include many counties that were at the time covered by Section 5?

A A substantial number of District 1 counties are Section 5 counties, and there are historical reasons for that. Northeastern North Carolina was the venue for most of the slave plantations in North Carolina during the period of slavery. And when slavery ended 150 years ago, many African-Americans continue to live on the soil.

And they, through the years, have began to have families and to multiply, and the population – the population of African-American communities continues to be high as compared to the white communities. In Ward County, for example, majority-black. Halifax County, majority African-American. Northampton County, Hertford County, Bertie County, all of these counties are majority African-American and there are historical reasons for it.

Q And when you said here, "comply with the Voting Rights Act," you specifically had in mind Section 2?

A Yes.

MR. PETERS: All right. I have no further questions. [204] Thank you very much.

THE COURT: Redirect?

MR. SPEAS: Just a couple of clarifying questions. Thank you, Congressman Butterfield.

REDIRECT EXAMINATION

BY MR. SPEAS:

Q You were asked a series of questions about the 2001 Plan measured both by Census 2000 data and then by Census 2010 data; correct?

A Yes.

Q When a legislature enacts – when the legislature enacted the 2001 Plan, it only had the 2000 Census data; correct?

A That would seem to be logical. It was the following year, yes.

Q And it did not have any 2010 Census data to submit to the Department of Justice for Section 5 preclearance purposes?

A That is correct.

Q And only by peering into some crystal ball could the General Assembly in 2001 guess what the numbers would be in 2010?

A That would be correct.

Q Okay. Now, one final question. All the years you've spent in voting rights litigation, it is your understanding that each district must be narrowly tailored to meet the requirements of Section 2?

[205] A One size fits all does not work in North Carolina, and I don't believe would work in any southern state whatsoever. In order to draw a fair map that meets the requirements of the Constitution and the State Constitution, I believe that you have to perhaps maybe not look at county-specific data, but at least regional data.

Look at the north – look at – because even the voting behavior between Durham and the other part of the district is different. There's a lot of coalition building in Durham. That was alluded to earlier. Polarization is – I'm not going to say nonexistent in Durham, but it's not as – at the level that it is in Halifax County. And so I believe that any responsible map drawer should look at regional data in order to determine the severity of the polarization in voting and to narrowly tailor that map to meet that data.

Q Would it be accurate, Congressman Butterfield, that Congress – that Congressional District 1, as now configured, includes a county, Durham County, where racially polarized voting is probably among the least in the state; and at the same time, Bertie County, for example, where racial polarized voting may be higher?

A That's a good example, Mr. Speas. Durham County, which is the county I spent many years of my formative life in as a college student and as a law student, black leaders in Durham fought some real tough battles over the years. And it grew out [206] of that a sense of working together in the political arena.

And even though there continue to be differences in Durham between the racial groups, there is cohesion on many of the political issues. And we don't have, in Bertie County of Eastern North Carolina, that degree of cooperation. African-Americans and whites like

each other and get along, but when it comes to the voting booth, their behavior is in stark contrast.

Q To Durham?

A Sir?

Q To Durham County?

A In stark contrast to Durham County, yes.

MR. SPEAS: Thank you very much, Congressman.

THE WITNESS: Yes.

MR. PETERS: Your Honor, just one or two questions.

RECROSS-EXAMINATION

BY MR. PETERS:

Q Congressman Butterfield, Mr. Speas asked you about the census data – the 2000 Census data when the 2001 Plan was adopted, and the General Assembly not having a crystal ball to see what things were going to look like come the 2010 Census. But would you agree that the 2000 – applying the 2010 Census to the 2001 District is useful in seeing what the population of the district actually looked like by the end of the decade?

A It's good for an analysis. It's probative of reaching [207] what a fair district should look like. I would agree with that, that the 2010 data when compared to the 2001 data is probative in reaching a result, yes.

Q Do you know which census data the United States Justice Department would have used in evaluating the benchmark for Section 5 submission?

A I don't know.

MR. PETERS: I have nothing further, Your Honor. Thank you.

MR. SPEAS: No questions, Your Honor.

THE COURT: You may step down.

(At 4:07 p.m., witness excused.)

MR. SPEAS: Thank you. May Congressman Butterfield be excused?

THE WITNESS: Should I leave these exhibits?

THE COURT: Any objection to Congressman Butterfield being excused?

MR. PETERS: Oh, no, Your Honor. We appreciate Congressman Butterfield him being here and wish him safe travels.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right.

MR. SPEAS: Your Honor, we would call our first expert witness, Dr. David Peterson. Dr. Peterson, if you would come around, please, and be sworn.

[208] (Witness sworn by the clerk.)

MR. SPEAS: Your Honor, if I may, I have a collection of witness notebooks.

THE COURT: All right.

MR. SPEAS: If I may, this notebook contains documents that Dr. Peterson will be talking about. I hope I have them in better order this time, Your Honor. There's three of those for the judges and one for Mr. Farr, and the remainder for the clerks. Oh, you need one. May I approach the witness, Your Honor?

THE COURT: You may.

DAVID PETERSON,

PLAINTIFF'S WITNESS SWORN AT 4:09 p.m.

DIRECT EXAMINATION

BY MR. SPEAS:

Q Dr. Peterson, would you state your name for the record, please.

A Yes, my name is David West Peterson, P-E-T-E-R-S-O-N.

Q And would you review for the Court your educational background?

A Yes. I have a bachelor's degree from the University of Wisconsin, and master's and Ph.D. degrees from Stanford University, all in electrical engineering.

Q And would you describe for the Court your work experiences after receiving your Ph.D?

[209] A Yes. After I got my Ph.D, I went into the Army for a couple of years where I served at the Institute for Exploratory Research at Fort Monmouth, New Jersey, doing basic research. And then I took a faculty position at Northwestern University, where I taught in the School of Management subjects,

statistics, operations, research, generally-applied mathematics, computer applications, that sort of thing.

And then I took a professorship at Duke University, where – in the School of Business there. And I continue to teach operations research, statistics, applied mathematics, computer applications, and that sort of thing. And after I had been there half dozen years or so, I got involved with attorneys doing consulting work and helping with statistical aspects of their cases, which led to the

formation of a small consulting firm. We did consulting and software development.

The firm was called PRI Associates. And in working with them, I worked, I suppose, with 1,000 or so different legal teams on various statistical issues, such as employment discrimination, political redistricting, jury selection, high-tech intellectual property disputes, and so forth.

Q Are you the author of any scholarly articles in professional and academic journals?

A I'm coauthor of a book called *Use of Statistics in EEO Litigation.* I'm sole author of another book on the use of statistics and litigation, and I'm the author of several dozen [210] articles that have appeared in professional journals, refereed professional journals.

Q And are your books about statistics and litigation now in – they've been out in a number of versions; is that correct?

A Yes. My first book on the subject came out in – I think it was 1978, or thereabouts, and it's now in something like its 30th edition.

Q Okay. And have you qualified – been qualified and testified as an expert in any lawsuits?

A I have, in both state and federal courts.

Q And do you have an estimate of the number?

A Hard to say, but certainly at least 50 cases, and most likely more.

Q And were you qualified and testified as an expert in the *Cromartie* litigation concerning Congressional District 1 that was litigated back in the 1990s?

A Yes.

Q Dr. Peterson, if you would turn to Tab 1 in the notebook in front of you. Let me ask you if, at the – toward the end of Tab 1, there appears Appendix A, which is a longer version of your qualifications and experience than you just described?

A Yes.

Q And is that accurate?

A It is, even though it bears a date from a couple of years [211] ago, it's essentially up to date. I haven't done much in the last couple of years. I've been mostly retired.

Q Tree farming, I believe?

A Tree farming, yes.

MR. SPEAS: Your Honors, I would tender Dr. Peterson to the Court as an expert in the field of applied mathematics. MR. STRACH: No objection, Your Honor.

THE COURT: All right. Dr. Peterson then may testify as an expert in the field of applied mathematics.

BY MR. SPEAS:

Q Dr. Peterson, would you describe for the Court the analysis that you undertook for the plaintiffs in this case?

A Yes. I examined the 1st Congressional District and the 12th Congressional District, as presently constituted, and addressed the issue of whether the borders of each appear to have been constructed more for the purpose of collecting Democrats within, or more for the purpose of collecting blacks within.

Q And what conclusion did you reach with respect to those two districts?

A Well, I did something that I call a segment analysis. And what the segment analysis shows is that race better accords with each of the two boundaries than does political party preference.

Q In other words, race more than politics accounts for the [212] boundaries of Congressional 1 and 12?

A Yes, that's correct.

MR. SPEAS: My colleague, Mr. Hamilton, has informed me that the document that Dr. Peterson is speaking from is Plaintiff's Exhibit 15. I apologize for that. Thank you, Mr. Hamilton.

BY MR. SPEAS:

Q Would you, Dr. Peterson, talk to the Court a little bit about the concept of a segment analysis? What are you doing?

A Sure. A segment analysis arises from the following line of thought: Let's suppose someone hands us a map with a hand-drawn line on it along with a question of is there some objective way that you could determine why that line was drawn the way that it was? And if the line was drawn, let's say, as an attempt at a contour line, we would expect that if we walk along the path on the ground traced out by that line, that we could reasonably expect to see that, most of the time at least. The land is higher on the one side of the path than it is on the other side of the path. And if we observe that that's the case, that gives us some confidence that maybe the purpose behind that line was that it was an attempt at drawing a contour line.

Alternatively, if, as we walk along the path traced out by that line, we see that, oh, say, the property on one side of the line is under different ownership than property on [213] the other side of the line, that would give us some confidence that perhaps the line was

drawn as a boundary line depicting ownership or separating ownership of the land.

The question that was posed to me, basically, was here's the boundary of a political district. What can you say about why it was placed just where it was? And, in particular, can you say anything about whether it seems to have, built the way it was – have been built the way that it was for the purposes of collecting blacks within; or does it seem – is the evidence stronger that it was built, perhaps, with the purpose of collecting Democrats within? So that's the question that a segment analysis attempts to address.

I'm going to walk along the boundary, at least in concept, and basically look, first, at the issue of whether the line seems to have been drawn for the purpose of collecting Democrats inside. And if that's the case, what we should expect to see as we walk along the line is that the representation of Democrats on the inside of the path is greater than the representation of Democrats on the outside.

On the other hand, if the line was drawn for the purpose of collecting blacks within, we would expect to see as we walk along that the representation of blacks on the inside is greater than the representation of blacks on the outside. And what a segment analysis does is, basically, go around the boundary of each of the two districts and – twice; once [214] looking at the representation of blacks inside and out, and once looking at the representation of Democrats inside and out.

Q And Dr. Peterson, behind Tab 1, does there appear your second affidavit marked Plaintiff's Exhibit 15; and I would ask you whether or not that is the – sets forth your results of your segment analysis for Congressional District 12? Tab 1, second affidavit.

A Yes, that is a description of my analysis – my segment analysis of the 12th District.

Q Would you, Dr. Peterson, walk the Court through that –

A Sure.

Q – and explain it to them.

A Sure. A segment analysis, under the present circumstances, is rather limited by the availability of data. What we have at hand is precinct-by-precinct data on the representation of Democrats among the population, and we have precinct-by-precinct data on the representation of blacks within the population. And as it happens, the boundary of the 12th District – let me talk first about the 12th District – pretty much follows precinct lines, so that as one walks along the border of the 12th District, there is an inside precinct and then an immediately adjacent outside precinct.

And as we progress along the boundary a little ways, eventually, one of the precincts changes, either the inside precinct changes or the outside precinct changes, and we enter [215] upon a new segment of the district boundary, the voting district boundary.

And it happens, going precinct by precinct, the boundary of the 12th District breaks into a total of 330 segments, each segment characterized by an inside precinct and an outside precinct. And for each precinct, we can measure the representation of blacks in that precinct, inside and outside, and compare the two and determine which is greater.

And we can also compare the representation of Democrats on the inside precinct and the outside precinct, compare the two, and determine on which side of the path the representation is greater.

The segments on which the – for which the representation of blacks on the inside is greater than on the outside, I call Type B – B for black – segments. And the segments for which the representation of Democrats on the inside is greater, I call Type D segments, Democrat segments.

And as it happens, not too surprisingly, most of the segments, most of the 330 segments are Type B segments, and most are also Type D segments. And, in fact, most segments are both Type B and Type D.

But the question here is, really, can one determine whether there is more support, whether there's more evidence that the boundary was placed for the purpose of collecting blacks within or for the purpose of collecting Democrats [216] within. And to examine that issue, we have to look at the segments which are not both Type B and Type D.

For example, if we have a segment that's Type B, but not Type D, that is, blacks are represented inside to a greater extent than they are represented outside, but Democrats are represented outside to a greater extent than they are represented inside, such a segment is consistent with the hypothesis that race, to an extent, greater than political considerations accounts for the placement of that segment or that portion of the boundary of the 12th District. A segment like that supports what I call the race hypothesis, that race was more important than political affiliation in accounting for the placement of that particular segment of the 12th District.

On the other hand, a segment might be such that the representation of Democrats on the inside is greater than the representation on the outside, but the representation of blacks on the outside is greater than on the inside. And such a segment I call a Type P

segment because it supports the party hypothesis more than it supports the race hypothesis.

And what I do, then, in a segment analysis is go around and count up the number of Type B segments – the number of Type R segments, sorry, the ones that support the race hypothesis, and the number of Type B segments, the ones that support the party hypothesis over the race hypothesis. And the results of those counts are shown in Table 1.

[217] Q I'll put Table 1 up on the screen.

MR. SPEAS: And Table 1, Your Honors, is on page 6 of Exhibit 26 – Exhibit 15 under Tab 1. Table 1, Tables of District 12 Segments By Race and Party Type.

A And I would like to direct the Court's attention, first, to the first pair of numbers.

Q Is your pointer working?

A Well, no, actually.

Q Technical flaw.

A We'll try using words instead. Here we go. In the northwest corner there, there's a pair of numbers, 6 and 8. And those represent the results of one segment analysis. In that particular analysis, there were six segments that were of the race type; that is, they supported the race hypothesis over the political hypothesis; and there were eight segments that did just the opposite, supported the party hypothesis over the race hypothesis.

But in doing that segment analysis, I used the entire black population for purposes of measuring the race within each precinct; that is, I noted the proportion of the entire population associated with each precinct that were blacks. Now, there are other ways, as has

been brought out already today in testimony, of measuring the representation of blacks. One could use, for example, a black voting-age population. Well, that's covered in the next line down.

[218] If we use black voting-age population as a basis for doing a segment analysis, in the first column there, the pair of numbers, 7 and 7, show up underneath the first two that we talked about. And that reflects the fact that for that particular segment analysis, there were seven segments that supported the race hypothesis and seven segments that supported the political hypothesis. Same number of segments in each case.

But as there are different ways of measuring the representation of blacks, so, too, are there different ways of measuring the representation of Democrats. And what was done in the first column there is to base the representation of Democrats on the percentage of registered voters in each precinct who are registered as Democrats.

The next column over – in fact, the next three columns over are all based not on just voter registration party identities, but rather, on behaviors of voters in actual elections. So the next column over pertains to the 2008 gubernatorial election in North Carolina. The next column over pertains to the 2008 presidential election in North Carolina. And the final column – ah, we have a cursor on the screen here that may help – thank you very much, Stacy. In the 2010 election, we have the senatorial election in North Carolina.

So we have four different ways of measuring the representation of Democrats coupled with three different ways [219] of measuring the representation of blacks for a total of 12 different studies, 12 different

segment analyses, the results of all of which are presented in this one table.

Q Clarifying point, Dr. Peterson. So it's – Table 1 sets forth the results of not a single segment analysis, but 12 segment analyses?

A That's correct, yes.

Q Thank you.

A The same analysis repeated using different measures of racial representation and different measures of representations of Democrats.

I should mention that the final line in the table is all based on the representation of blacks among registered voters. That's the third way that I measured black representation.

If you look over in the rightmost two columns, you'll see going down there that, in every case, the number of segments supporting the race hypothesis exceeds the number of segments supporting the party hypothesis.

Looking at the first column on the left under the one that we started at up in the northwest corner, we see that in that instance, the race hypothesis is supported by six segments, whereas the party hypothesis is supported by eight segments. So, looking at the overall balance just with that one study, there's more support in the segment analysis for the [220] party hypothesis, that the boundary was drawn for political reasons rather than race.

The next line down, we noticed the balance was just even, so there's a tie. The next line down, we know that, again – we see again that the balance tips in favor of the political hypothesis.

Moving over to the next column, we see the same pattern again. The top entry favors the political hypothesis. The next entry down, there's an even balance. The third line down, again, the balance tips in favor of the political hypothesis. But in the last two columns in every single case, the balance tips in favor of the race hypothesis. And furthermore, it tips more extremely in favor of the race hypothesis in each of those six cases than in any of the cases in which it tips in favor of the political hypothesis.

Viewed as a whole, Table 1 indicates that there's more support for the race hypothesis than for the political hypothesis.

Q Thank you, Dr. Peterson. For just a minute, I'd like you to focus on the segment analysis, comparing the 2008 presidential results with three different measures of the black population. Is it true that in every one of those analyses, the race hypothesis better explains the boundary of the district than the party hypothesis?

A Yes, that is true.

[221] Q Okay. Now, Dr. Peterson, did you repeat this segment analysis for Congressional District 1?

A Yes, same analysis, but, of course, different data.

Q And if you would turn to page 2 of the notebook in front front of you, there appears your fourth statistical report marked Plaintiff's Exhibit 16. And I would ask you, Dr. Peterson, if that sets out your segment analysis for Congressional District 1?

A Yes, it does.

Q And would you describe for the Court that study.

A Yes. This is the same analysis that I did for the 12th District, except I did it for the 1st District.

Q And are the results of your study for Congressional District 1 set forth in Table P5.1 –

A Yes.

Q – appearing on page 6 of Plaintiff's Exhibit 16 and now on the screen?

A Yes, that is correct.

Q Okay. And would you review with the Court the results set forth in Table P5.1 on page 6?

A Yes. The – again, there wasn't just one segment analysis that was done. There were 12 analyses done using three different measures of racial representation – of black representation, rather, and four different measures of the representation of Democrats. And what you see there is that in [222] the first column, in every single instance, the race hypothesis is more strongly supported than the political hypothesis.

And in the last column, in every single case, the race hypothesis is supported more strongly than the political hypothesis. And in the bottom row, which overlaps the first and last columns, the same is true.

Only for the four studies sort of in the middle upper central part of the table is there a departure from this pattern. And, in the second column, the top pair of numbers, 8 and 9, show that there's slightly more support for the political hypothesis than for the race hypothesis.

And the next one down, the 7 and the 8, show that, again, there's slightly more support for the political hypothesis than for the race hypothesis.

And then moving over to the next column, looking at the first two rows, we see there are two ties there; in the first instance, eight segments supporting the race hypothesis over the political hypothesis, and eight segments supporting the political hypothesis over the race hypothesis. And the next line down is 6 and a 6.

So, overall, there are eight instances in which the segment analysis comes out more strongly in favor of the race hypothesis than the party hypothesis, two instances in which there's a tie, and two instances in which the political hypothesis is ever so slightly favored over the race [223] hypothesis. Again, in every instance in which the race hypothesis has more support than the political hypothesis, the degree of imbalance is greater than in any instance in which the political hypothesis has more support than the race hypothesis.

Overall, I think you have to say that Table P5.1, the segment analyses, are more strongly supportive of the race hypothesis than they are of the political hypothesis.

Q So is it correct, Dr. Peterson, that based on your segment analysis for Congressional District 1 and Congressional District 12, as enacted by the defendants in 2011, you conclude that the race hypothesis better accounts for the boundary of both districts than the political hypothesis?

A Yes, that is correct. And I should point out, I think, that this is not the first time I've ever done a segment analysis.

Q I wanted to talk just a little bit about that. You did this once before, I believe?

A I have, yes.

Q And could you explain to the Court the circumstances under which you undertook to do a segment analysis and what you found?

A I did this in connection with a *Cromartie* litigation in the Wake of the 1990 Census. And again, it was the 12th District which was being challenged. And the results that I [224] found in that instance were just the opposite of what I found this time. So I found that there was more support for the political hypothesis than for the race hypothesis.

Q And do you – are you aware of the black voting-age population percentage in the version of Congressional District 12 you were examining in the *Cromartie* legislation – litigation?

A No.

Q Okay. Now, Dr. Hofeller, I believe, undertook to respond to your segment analysis for Congressional District 12; is that correct?

A Yes.

Q And is that set out at Tab 3 of of your witness notebook, which is the affidavit of Thomas Hofeller, or the portion of it that Mr. Hofeller filed in the *Dickson* matter on January 9, 2012?

A Yes.

Q And can you describe for the Court the response Dr. Hofeller made to your analysis of Congressional 12?

A Yes. Dr. Hofeller responds just to my second affidavit, the one that addresses District 12. So far as I'm aware, he has made no response to my analysis of District 1.

His response to my analysis begins on page 17 of his affidavit, in paragraph 45, and pretty much runs to the

end of that affidavit. And it seems to me that the real meat of his [225] response is contained in his paragraph 59 on page 21. And his paragraph 59 rests on an analysis of the data shown in his Appendix 2.

Q And can we put Appendix 2 on the – thank you. Is this Appendix 2 from –

A Yes, it is.

Q – Mr. Hofeller's response?

A Yes.

Q And can you use that to explain his response?

A Sure – well, yes, as best I understand it. What Dr. Hofeller does is to distinguish three different geographic areas. There's a geographic area that is in both the old version of District 12 and in the new. It's what he refers to as – well, an area in the new and the old 12th. You might think of it, I suppose, as some sort of core area.

And then there's an area that is only in the old 12th District but not in the new, so it was taken out of the 12th District in the process of forming the new. And then there's an area that's only in the new, something which was not in the old, but now it's in the new.

And for each of these areas, in Appendix 2, Dr. Hofeller supplies some data, on the one hand, the representation of blacks in that area; and on the other, the representation of Democrats based on the 2008 presidential election.

[226] And what he does is to note in a central column here that the representation of black voting – representation of blacks among the voting-age population in the first of these districts, the core district, the part that's in the old 12th District and also in the new, that the representation of blacks among

the voting-age population is 54.22 percent. And then underneath that, that the representation of blacks among the voting-age population only in the old 12th District, but not in the new, is 22.77 percent. And then underneath that, that the representation of blacks only in the new portion of the 12th District but not in the old is 43.24 percent. And then underneath that, he shows 20.47 percent, which is the difference between the 43.24 percent and the 22.77 percent.

So we'll hold that thought and move on to the analogous data here for the representation of Democrats. And what he shows in this table is that in the core area, the representation of Democrats as measured by the presidential election in 2008 was 79.92 percent. The representation of Democrats only in the old 12th District was 53.01 percent. And that the representation of Democrats in the new part of the 12th District is 75.39 percent. And, again, underneath that, there is a percentage shown, 22.38 percent, which is the difference between 75.39 percent and 53.01 percent.

Now, by some process, which is not entirely clear to me, Dr. Hofeller reaches the conclusion stated in the last [227] sentence of his paragraph 59, which is, quote:

"The only political decision which one can perceive by the desire to place the lower performing VTDs into the 12th District is an attempt to submerge Republican vote in a safe Democrat seat."

I have to confess, I don't see how he gets there from the data in Appendix 2. And, indeed, I don't even understand what that conclusion means, but –

BY MR. SPEAS:

Q Did you undertake to examine Dr. Hofeller's response to your Congressional 12 affidavit?

A Well, as I interpret Appendix 2, it was meant for us somehow to look at the 20.47 percent and the 22.38 percent and come to some sort of conclusion. And the only conclusion that leaps out at me is that, in taking out part of the 12th District and replacing it with a new piece of North Carolina not previously in the 12th District, this had the effect of increasing the representation of blacks by this 20.47 percent.

That's really not a percentage increase, but it's a difference in the two representations that I've already described the calculation of. But it also had the effect of changing the representation of Democrats in the 12th District. And the difference calculated, analogously, is 22.38 percent.

And it seems to me that the comparison that's invited [228] here is the 22.38 percent against the 20.47 percent. And maybe, what we're supposed to observe here is that the 22.38 percent being greater than the 20.47 percent, we should infer that it was politics more than race that influenced the creation of the new 12th District.

And if that is the right interpretation, that's a false conclusion for reasons which I hope presently to demonstrate.

Q And do you explain why that is a false conclusion in your third affidavit, which appears after Tab 4, and which is marked as Defendant's Exhibit D118?

A Yes.

Q And would you explain for the Court what is set forth in that third affidavit?

A It may be most expeditious to look at Table P3.1 at least briefly.

Q And that's now on the screen. And Table P3.1 appears in that report as – at the end as immediately following your signature page; correct?

A Yes, immediately following page 7.

Q Could you explain what appears on Table P3.1?

A Yes. What appears on – one of the things that we learned from the segment analyses, both of the 1st District and the 12th District, is that it makes a difference how you measure black representation or how you measure the representation of [229] Democrats in a precinct.

And so what I've done in Table P3.1 is just to take Dr. Hofeller's Appendix 2 table, which measures race only one way and measures Democrat percentages only one way, and expand it to measure race three different ways, the three ways that were used in the segment analysis, and political affiliation four ways, the four ways that are used in the segment analysis, instead of just the one way that's used in Appendix 2.

And the reason why I said maybe we'll just look at Table P3.1 briefly is that it's a mess. There's a lot of data there, and it's very difficult to pick stuff out. So I suggest we segue to Table P3.2, which is now on the screen, and which appears immediately after P3.1 in your affidavit.

A Yes.

Q Can you describe for the Court –

A Yes. In Table P3.2, what I've done is, essentially, 12 different versions or 12 different variations on the study that I think Dr. Hofeller presents in his Appendix 2.

So, once again, there are 12 entries there corresponding to the three different ways of measuring the representation of blacks and the four different ways of measuring the representation of Democrats that we encountered previously in connection with segment analyses.

And, in each case, in the body of the table, I've entered a P if the comparison afforded by the – by parallel [230] analysis of Dr. Hofeller's Appendix 2 supports the party hypothesis over the race hypothesis. And I've entered an R where the opposite is true, where doing the type of analysis that I attribute to Dr. Hofeller, in his Appendix 2, it turns out that the comparison of the two percentages is such as to favor the race hypothesis over the political hypothesis. And the percentages being compared are shown in that table across the top there, the 16.49 percent, the 22.38 percent, the 19.64 percent, and the 25.31 percent, all being percent – percent representations of Democrats.

And going down the left side of the table, the 21.46 percent, the 20.48 percent, and the 25.17 percent being the representations – changes in the representations of blacks. And the comparison of the percentages shown in the column headings and the percentages shown in the row headings gives rise to the R or P in the body of the table.

And, as we look across this table, we see that in five instances, there are Ps, and in seven instances, there are Rs, which is to say the – on balance, the evidence here would seem to tip in favor of the race hypothesis over the political hypothesis.

Q And what, Dr. Peterson, is displayed in Table P3.3 immediately below?

A Well, that's another analysis of almost the same type, except that if we could go back to – if we could go back to [231] Appendix 2 for a minute, I want to point something out.

Q Do we have – Appendix 2 is now on the screen.

A Here we are. Okay. And what I would like to point out is that when we were calculating the difference in representation of blacks, what we did was to – in that table and looking at the column pretty much in the middle of the table, what we did was to subtract 22.77 percent from 43.24 percent, coming up with the 20.47 percent. Well, that's one way of measuring the differences between two percentages, but there's lots of other ways.

And one of the most common is to take the ratio. Suppose we divide the 43.24 percent by 22.77 percent and see what percentage there has been an increase in the representation of blacks. And suppose we do the same thing with respect to Democrats. In the rightmost column, what we'll do is instead of subtracting one percentage from the other, we'll take the ratio of the 75.39 percent to 53.01 percent and use that as a measure of the difference between those two percentages.

Q And are the results of that –

A And if you – if you repeat the analysis that I reported on in Table P3.2, using percentage increases instead of simple difference increases, you get Table 3.3.

Q And it's back on the screen – okay. It's back on the screen.

[232] A And it's back on the screen now. Again, the percentages are arrayed across the top and down the left side of the table. You compare those two at a time,

and register a P or an R in the body of the table depending as the percentage in the row is greater or less than the percentage in the column. And, my goodness, in every single case, the race hypothesis is – has more support than the political hypothesis.

Q Dr. Peterson, at the end of the day, after analyzing – conducting this analysis of Congressional District 12, the segment analysis, in the application of your expertise in applied mathematics, what is your view with regard to the question whether race or politics better accounts for the boundary of Congressional 12?

A Well, the segment analysis shows that with respect both to the 1st District and to the 12th District, that there is more evidence that – there's a better correlation with race than with political considerations in the placement of the boundary.

The – my re-analysis of Dr. Hofeller's Appendix 2 indicates, in the first instance, the 12 studies that are reported in Table 3.2, that on balance, there's more support for the race hypothesis than the political hypothesis. And in Table P3, which reports on another dozen analyses based on Dr. Hofeller's Appendix 2, that, once again, race better accounts for the boundary than the political hypothesis.

MR. SPEAS: Thank you, Dr. Peterson. No more [233] questions at this time.

THE COURT: Cross-examination?

MR. STRACH: Thank you, Your Honor. Good afternoon, Dr. Peterson.

THE WITNESS: Mr. Strach.

MR. STRACH: Yes, Phil Strach for the defense. We've met, it's been several years now, in your deposition; is that correct?

THE WITNESS: That's right, yes.

MR. STRACH: I've got just a few questions for you about your analysis.

CROSS-EXAMINATION

BY MR. STRACH:

Q I want to focus, first of all, though, on making it clear in my mind what you are not concluding.

A Okay.

Q Based on a review of your reports, you are not saying, are you, that if race, quote: "Better accounts for the boundary" of the 12th or the 1st, that therefore, race predominated or was the motivating factor for the district?

A That's correct, I am not saying that.

Q All right. And it's also fair to say, isn't it, Dr. Peterson, that you're not drawing any conclusions about a causal effect between what the map drawer was doing and what was – and the motive. You're drawing a correlation, not [234] causation; is that correct?

A That's right. What I'm looking at is an effect. I'm not opining as to why that happened the way that it did.

Q All right. Now – and that's important, I think, because it's true, isn't it, Dr. Peterson, that you've never actually drawn a redistricting map; isn't that right?

A I have participated in the redistricting process, but not at the point of actually drawing districts.

Q All right. And at least as of the time that we had our deposition together, you were not familiar with a computer program called Maptitude; is that correct?

A Not familiar enough to be able to use it. I may have seen it on a lab visit that I made, but I'm not – I'm not familiar with it to the point that I could actually use it.

Q Okay. And is it your understanding that, at least in this particular case, it was the computer program Maptitude that was used by Dr. Hofeller to draw these districts?

A I don't have an understanding on that point.

Q All right. And let me make sure I understand the way you conduct your segment analysis. If I am correct, your analysis, as you said, walks around the boundary of the district; is that right?

A Conceptually, yes.

Q All right. And you understand, don't you, Dr. Peterson, that when a map drawer draws a district, they do not draw it in [235] a sequential manner like that?

A Well, yes and no. The person who constructed both the 12th District and the 1st District was obviously working with precinct-sized chunks of North Carolina, because the boundaries, in so many instances, follow precinct lines, not all instances, but in many instances. So it's pretty clear that precincts figured in the creation both of the 12th and of the 1st District, but I can't say that the focus of the person who was constructing the map was on segments and their inside and outside precincts.

Q In other words, it's probably pretty unlikely that the map drawer or a map drawer would draw one

segment of a district and then analyze it for race versus party, and then proceed to the next district and so forth in drawing the district.

A Not exactly that way. I think it's more likely that the voting district drawer would consider the inclusion of a precinct within or perhaps consider exchanging it with another precinct or something like that. I think precincts loomed large in the decision process, but exactly how they were used, I can't say.

Q And your analysis looks at each – I think what you called inside precinct, and then compares it to the precinct immediately on the outside of the boundary; correct?

A Yes.

Q But when someone's drawing a map, they may very well pick [236] one precinct at the southern part of the district in exchange for a precinct at the top part of the district?

A They might, yes.

Q So when a map is actually being drawn, it's not necessarily a one-to-one inside versus outside choice?

A That's correct.

Q And your analysis assumes a binary choice for the map drawer when selecting the precinct?

A Not really. What it's looking at is an overall pattern. And, in that sense, it's much like the calculation of a correlation.

MR. STRACH: Okay. Your Honor, I'm about to go into another line that could take us a while, and I'm happy to do that at your –

THE COURT: One second. Keep on going for a while longer.

MR. STRACH: All right. Thank you, Your Honor.

BY MR. STRACH:

Q Dr. Peterson, could you explain to the Court the concept of – we talked about this at your deposition, called – let me find it in my notes here, Forensic Decision Analysis?

A Sure. I wrote a book about Forensic Decision Analysis. And it's a – it's an approach to trying to figure out why decisions were made the way they were after the fact.

Q Is your segment analysis a species of this Forensic [237] Decision Analysis?

A It is, but it's – but it's a better illustration of the kind of compromise sometimes one has to make with a good Forensic Decision Analysis to apply it in practical circumstances. It's not a very good example of a Forensic Decision Analysis or at least an ideal Forensic Decision Analysis.

Q Right. And that's because with a Forensic Decision Analysis, ideally, you're able to account for all of the alternative decisions that were available to a decision-maker in evaluating what motivated the decision; is that right?

A Yes.

Q And in your segment analysis, it's not possible for you to have accounted for all the many other factors or variables that a map drawer had to think about when choosing to select or deselect a particular precinct?

A That's correct. And part of the difficulty is the unavailability of data. We have data only at the precinct level. And even what's available at the precinct level is pretty much in summary form. So

there's a limit to how close we can actually get to the decision process in a segment analysis.

Q All right. So, for instance, if the map drawer with respect to, say, District 12 is trying to accomplish a political result in four or five of the surrounding districts [238] to that district, your segment analysis can't perfectly capture the extent to which that political goal factored into the boundary?

A That's correct. All I'm doing is measuring sort of an overall correlation. I'm looking at the result, not the process.

Q Okay. Let's talk about – well, let me actually go back to the *Cromartie* case and your analysis in the *Cromartie* case. I want to make sure that this is clear to the Court. In the *Cromartie* case, you were hired by the State –

A Yes.

Q – at that point in time; right?

A Yes.

Q And the State, in that case, was trying to defend the 12th District from a racial gerrymandering claim much like this one; correct?

A That's correct.

Q And you were hired – were you hired by Mr. Speas in that case?

A I don't recall who actually hired me, but I worked with Mr. Speas in that case.

Q All right. In that case, your analysis produced a result that was favorable to the position Mr. Speas's client was taking in the case?

A Yes.

[239] Q And that particular conclusion was that race couldn't have predominated because politics was a, quote, "better explanation for the district"?

A Yes.

Q All right. So –

A Well, I don't know that I reached the conclusion that race couldn't have predominated. What I showed was that, according to a segment analysis, politics was a better explanation for the boundary than was race.

Q And in that case, you understood that the burden was on – the State simply had to show that something else better explained the district in that case; is that correct? In other words –

A Could you rephrase the question?

Q You were working on this side of the aisle in that case –

A Right, that's true.

Q – right? And so, what you had to show, the burden wasn't on the State. You just simply had to show –

MR. SPEAS: Your Honor, objection. He's questioning him about a legal matter.

THE COURT: Yeah, I agree. Let's rephrase the question.

MR. STRACH: All right.

THE COURT: I think it's getting a little confusing in terms of an applied mathematics expert talking about burdens [240] of proof in a courtroom.

THE WITNESS: Right. I'm not a lawyer.

THE COURT: Hold on just a second.

THE WITNESS: Sure.

THE COURT: I'm not sure a foundation's been laid enough to get into something along this –

MR. STRACH: All right. Thank you, Your Honor.

THE COURT: – at least as the question was framed.

BY MR. STRACH:

Q I think – so I'll just leave it at in that particular case, though, you were working on the behalf of the State; is that correct?

A Yes.

Q And in this particular case, though, you were working on behalf of the challengers challenging the claim –

A That's correct, yes.

Q – is that correct? All right. Thank you. All right. Let's look at District 12, Dr. Peterson.

A Okay.

Q I want to focus on that. And I want to look at, first of all, you mentioned in your testimony with regard to the 12th District, I believe that the way you call it in your report is there's 330 pairs?

A Well, 330 segments, which means 330 pairs of precincts.

Q Okay. And out of those 330 segments, sort of going around [241] the 12th District, you could only use 29; is that correct?

A I don't have a figure in mind, but that's about right.

Q All right. And that's because in the vast majority of those pairs or those segments, you couldn't

make a determination of race versus party based on the data you had?

A That's right. There was a lot of – most of the pairs, 80 to 90 percent of the pairs were both type – what I call Type B and Type D pairs; that is, the representation of blacks was greater inside than outside, and the representation of Democrats was greater inside than outside for most of the way around both of those boundaries.

Q And Dr. Peterson, are you familiar with a concept called multicollinearity?

A I am, but I don't see how that applies under these circumstances.

Q Do you agree with me that, in North Carolina, there's a high correlation between race, including black, and registration in the Democratic Party?

A I believe there is, yes.

Q And also voting behavior, there's a high correlation between race being black and voting for Democrat candidates?

A Yes.

Q All right. And so, is it likely that you could only look at 29 out of the 330 segments because there's such a high correlation of multicollinearity between race and party in [242] North Carolina with respect to blacks and Democrats that it significantly reduced the population of segments that you could look at?

A To me, "multicollinearity" means something quite different from that. But, I think, just put in simple words, it is true that for most of the way around the boundary, both the 12th District and the 1st District, blacks are represented more heavily inside than outside, and so, too, are Democrats.

Q All right. So in your second affidavit, which, I believe, is P15, which I think is behind Tab 1 in your notebook, Dr. Peterson, if you could pull that out.

A Sure.

Q I want to take a look at your chart in paragraph 14. And we, in your direct testimony – are you there? Tab 1, it should be page 6.

A Yes.

Q And in that chart, you tallied up the results of the 12 studies; correct?

A Yes.

Q And so, there are 12 results, and each result is either a P, or an R, or it's tied; is that correct?

A In effect, yes. I didn't actually record Ps and Rs here, but –

Q Right. And that's what I want to – I want to look at the Ps – I know they're not in your report, but I want to look at [243] the actual number of Ps and Rs.

A Sure. Let's do it.

Q Okay. So, when I look at this chart, I tally up – and you tell me if I'm wrong – that there are six Rs all together?

A Yes, that's right.

Q Okay. So six studies in which you would contend that race was the better hypothesis?

A Yes, there's more support for the race hypothesis than the political hypothesis.

Q All right. And then, of the 12, as I count them, there are four Ps; is that correct?

A Yes, that's correct.

Q And then, there are two that are neutral, or tied?

A Yes.

Q All right. So, in all of the 12 studies for the 12th District and your segment analysis, what you have actually are six in which the race hypothesis, you say, is – better accounts for it, but six where race was not the better hypothesis; is that correct?

A That is true.

Q All right. And then, Dr. Peterson, if you would explain to the Court – there's a paragraph in your affidavit here about it. Would you explain to the Court what you mean by an unequivocal pair?

A Yes. There are some segments that no matter how you [244] measure race and no matter how you measure party affiliation, turn out to be either Type R segments, that is, they support the race hypothesis over the political hypothesis; or they turn out to be Type P, they support the political hypothesis over the race hypothesis. But their number is very small; there's one of each.

So, in common with all 12 of these studies, there is one segment in the 12th District which is, in every study, a Type R segment, and there is one segment which is, in every single study, a Type P segment. One of each.

Q Okay. So in those instances, the data is unequivocal as to one or the other?

A I'm – well, I would say they are equivocal with respect to the two hypotheses. There's equal support for the two.

Q Okay. And that's the point. So, where you look only at the unequivocal pairs, one being a P and one

being an R, then you would have to conclude with respect to those that race and party are equal explanations?

A If that was the only thing I knew about it, that is the conclusion I would reach –

Q All right.

A – but I happen to know more.

Q Right. Okay. And let's look at some of the more. Let's look at your third affidavit, which is – I believe it's behind Tab 4. And, in particular, I want to look at Table 3.2 that [245] you looked at with Mr. Speas.

A I've got it.

Q Got it? All right. Are you aware, Dr. Peterson, of testimony by Dr. Hofeller in the *Dickson* case, the State case, that when the 12th District was being drawn, the data that was being used to draw that was voting – black voting – or voting-age population and the percent of Obama-McCain vote?

A I don't know that I'm acquainted with that testimony, but that is the import, I think, of his Appendix 2.

Q Right. Okay. That being that when one looks at the percentage of Obama vote in the selected precincts that – in his Appendix 2, the percentage of Obama – the Obama percentage was higher than the race percentage; correct?

A Yes – Q Okay.

A – in Table P3.2, not in Table P3.3.

Q Right. Now, in Table P3.2, I'm not sure it was shaded on the version that was on the computer earlier, but in the actual affidavit, Dr. Peterson, I

believe you shaded a particular unit on Table P3.2; is that correct?

A I did, and it hasn't come through on the copies, but I can tell you what should have been shaded, what, in fact, was shaded.

Q All right. The one that should have been – was shaded in your original report was the bloc that is the intersection of [246] the row of voting-age population and the column of percent Obama; correct?

A Yes, that is correct.

Q And in that particular bloc, your study concluded that party was the better indicator?

A Well, I would attribute the study to Dr. Hofeller, but, yes.

Q So when you look at the data that Dr. Hofeller said that he looked at in drawing the 12th District, then your data shows that party is the better explanation; is that true?

A In the Table P3.2 analysis, not in the Table 3.3 analysis.

Q All right. And now, let's look at Table 3.3. In Table 3.3, what you did was you converted Dr. Hofeller's data to ratio; is that correct?

A Yes, as an alternative way of measuring the difference between two numbers.

Q All right. And what evidence do you have that converting those numbers to ratios is more reliable or valid?

A There's – I can't say that one is more reliable or valid than the other. They're just two different ways of looking at the same data.

Q All right. And the way you did the data happened to support your theory of the case; correct?

A It happened to. I didn't know it was going to before I did it.

[247] Q All right. Let's focus for a moment on the 1st District. Let's turn back to your fourth affidavit, which, again, I believe – well, it's a different one. I believe that's under Tab 2 in your notebook, Dr. Peterson?

A Yes.

Q And in particular, I want to look again – first of all, let's talk about those unequivocal pairs again, segments.

A Yes.

Q Isn't it true that with regard to the 1st District, again, you found two unequivocal pairs, and one was P and one was R?

A I have to look at the affidavit to see because –

Q Sure. If you look at paragraph 16 –

A Paragraph 16, right. Yes. One of each.

Q Okay. So as with the 12th District, with the 1st District, when you looked only at the data that was segments that were unequivocal, they basically cancelled each other out, race versus party?

A That's right, yes.

Q All right. Okay. And then let's look at –

MR. STRACH: Excuse me for a moment, Your Honor. Okay.

BY MR. STRACH:

Q If we look, Dr. Peterson, at – this is your fourth affidavit, page 6. And, again, this is your Table P5.1 on page 6.

[248] A Got it.

Q All right. So, again, if you try to find the intersection here in this chart, the study that represents the intersection between voting-age population and votes for the – in the presidential race; right?

A Yes.

Q Black voting-age population is in the middle, 2008 president is a column second from last. And if you trace the intersection of those two pieces of data, that study showed that race and politics were tied; is that correct?

A Yes.

Q Dr. Peterson, let me talk a little bit about the mechanics of – and in particular, talking about the 12th Congressional District, talk about the mechanics of constructing the district. When I – if I use the term "Transit VTD," do you have any idea what that means?

A Not exactly, but as you talk, I may develop an understanding.

Q All right. So, if you have a population in the district in the north and a population in the district in the south, you've got to connect the two somehow; is that correct?

A If they're going to be in the same district, yes.

Q Right. And that goes back to the fact that, sometimes, decisions up here affect decisions down here, and then you've got to connect the two; is that fair?

[249] A Yes.

Q Do you – did you attempt to do any analysis or does your segment analysis account at all for decisions that have to be made in terms of which – choosing a corridor or transit VTDs to go from one population to another?

A No, it just looks at the overall result, doesn't look at the process.

Q All right. And then, when you were deciding which VTDs or segments would be a P versus an R, you actually started by looking at which segments, which would be a B versus a D –

A Yes, that's correct.

Q – black versus Democrats; is that right? And as I understand the analysis, you decided whether it was a B or a D by adding up, say, the number of Democrats inside – the inside VTD and subtracting the number of Democrats from outside the VTD; is that fair?

A No, that's not right.

Q Explain to the Court how you did that.

A Sure. What I did was to look to the inside to see what the representation of Democrats was; that is, among, let's say, registered voters, what percentage of people residing in the inside precinct were registered as Democrats among the totality of voters who were registered.

And then, I did a similar thing for the outside precinct. And I compared those two percentages, the two [250] representations, degrees of presence of Democrats. And then I did the analogous thing for blacks.

Q And you looked at which one was higher?

A And I just looked at which one was higher, yes.

Q Okay. And you just looked at the raw numbers; correct?

A And determined which of the numbers was greater, inside or outside.

Q It didn't matter if it was even greater just by one?

A That's right.

Q So even by one person could determine –

A Well, one – one percentage say.

Q Okay. One percentage could determine a segment's fate of being labeled a B versus a D?

A Yes, that's true.

Q All right. And you could have – if you had wanted to, you could have weighted the percentages instead of taking the raw data; correct?

A Could have done? I can't think of any reason why the results would be more meaningful or reliable than the results obtained the way I did it.

Q But you didn't do a weighted percentage?

A I told you everything I did. I didn't do anything else.

Q All right. Now, your segment analysis is also not able to take into account decisions that are made by the map drawers with regard to protecting incumbents?

[251] A That's right. Again, I didn't look at process. What I've done is just look at the overall result.

Q And you don't try to account for the impact of under or overpopulation in a district?

A Well, not explicitly. Again, I assume some account was taken of over or underpopulation in the choice of precincts to include or exclude. But, again, I didn't look at process. The segment analysis looks only at overall result.

Q All right. You don't make any attempt to try to control for things like under or overpopulation?

A That's right. I didn't try to reconstruct the decision process in its detail.

Q Okay. And it's also true, Dr. Peterson, that you did not do any segment analysis for the alternative or competing plans that were introduced in the legislature for – certainly for Congressional Districts?

A That's right. The only segment analysis I've done in connection with this litigation are the two on which I have reported.

Q All right. So we have no frame of reference in terms of other plans and how they might have fared with the 12th and 1st Congressional District?

A Would you repeat the question, please?

Q So we don't have a frame of reference for how the enacted plans might have fared compared to a segment analysis of other [252] competing plans?

A Right. The only comparison I can offer is the one that Imentioned already in connection with the 12th District as itexisted in the 1990s.

MR. STRACH: That's all I have, Your Honor.

THE COURT: Redirect.

MR. SPEAS: Three or four quick questions, Your Honor.

REDIRECT EXAMINATION

BY MR. SPEAS:

Q Dr. Peterson, would you turn to, I believe, the last – next to the last page of Tab 1 where – your second affidavit, Plaintiff's Exhibit 15. And is that a map of Congressional District 12?

A I have it.

Q And the yellow color signifies what?

A Those would be inside border precincts. Those are precincts which were involved in the segment analysis of the 12th District on the inside.

Q Is this district a single precinct wide for much of the way?

A For much of the way, it is a single precinct wide, yes.

Q And there are interior precincts only in the city of Charlotte, the city of Greensboro, and the city of Winston-Salem?

[253] A Yes, I believe that – well, actually, there's a third – there are four areas in which there are inside precincts.

Q Okay. So, while you did not examine the core precincts in your segment analysis –

A If the pinkish ones are termed "core precincts."

Q Yes. The truth is, most of the precincts in Congressional 12 were examined?

A It looks like most of them did get included in the segment analysis, yes.

Q And that's because it's a single precinct wide through much of its –

A That's right, so they got included on the left side and on the right side.

Q All right. And now, you – Mr. Strach asked you about a number of issues about your methodology that you used here.

A Yes.

Q Did you use precisely the same methodology in *Cromartie* that you used here?

A I know of no differences. My intent was to use exactly the same, and I believe I did use exactly the same.

Q Okay. And the strength of the *Cromartie* analysis are reflected here, the weaknesses of the *Cromartie* analysis are reflected here?

A Yes.

Q And at the end of the day, in your professional opinion as [254] an expert in applied mathematics, do you still conclude that race, not politics, on balance, accounts better for the boundary of the district?

A That is true, yes.

MR. SPEAS: One final question. May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. SPEAS:

Q I'm going to place in front of you, Dr. Peterson, the historical congressional map book labeled Defendant's Exhibit 126. And I would ask you, Dr. Peterson, just to turn Tab 3 of that document. And I would ask you if that is the 1997 Congressional Plan that included Congressional 12 litigated in *Cromartie*?

A I don't know. It might be. I'm, at this point, not as familiar with the old District 12 as once I was.

Q Assuming it is –

A All right.

Q – would you look, then, at the third page, has – it said the voting-age population or that version of Congressional District 12. And what is it?

A It says here 43.36 percent.

Q Okay. And if you could look quickly at Tab 12 in Exhibit 126, and is that the current plan?

A Again, I don't know. It might well be. I don't know that [255] it's not.

Q Assuming it is, would you turn to the voting-age population for that district and tell me what the voting-age population for Congressional 12 might be?

A We need to specify a page for the Court, it seems to me. How can we do that?

Q Will you read page –

A Page 3 of 9.

Q And what is the voting-age population there?

A It appears to be 50 point –

Q Sixty-six?

A – sixty-six. Could be. Could be 88. But in any event, it's over 50 percent.

Q Would it be – if these numbers are correct, then, in the version of Congressional District 12 that you examined in *Cromartie*, the black voting-age population was 6 percent lower than the black population in the version of Congressional District 12 you have examined here?

A That appears to be the case.

MR. SPEAS: No other questions.

THE COURT: Anything in response?

MR. STRACH: Nothing in response.

THE COURT: You may step down.

MR. SPEAS: May Dr. Peterson –

THE COURT: Any objection to Dr. Peterson being [254] excused?

MR. STRACH: No, Your Honor.

THE COURT: All right. He may be excused.

THE WITNESS: Thank you.

(At 5:28 p.m., witness excused.)

THE COURT: All right. So, hopefully, we'll have some air conditioning tomorrow. Should we start right in with your other expert or will there be other evidence?

MR. HAMILTON: No, Your Honor. Our last witness. Will be Dr. Steven Ansolabehere, and we'll start with him right at 9:00.

THE COURT: All right. Very good. And then you all will be ready to move along with your evidence tomorrow as well?

MR. FARR: Yes, Your Honor.

THE COURT: All right. Then, anything we need to take up before we recess?

MR. FARR: Not from the defendants, Your Honor.

THE COURT: All right. We'll see everybody in the morning, then, at 9:00. We'll be in recess until tomorrow morning at nine.

(At 5:29 p.m., proceedings adjourned.)

* * * * *

CERTIFICATE

I certify that the foregoing is a correct transcript from the proceedings in the above-entitled matter.

Date: 10/19/2015

/s/ Joseph B. Armstrong
Joseph B. Armstrong, RMR, FCRR
United States Court Reporter
324 W. Market Street
Greensboro, NC 27401

[258] IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

Greensboro, North Carolina
October 14, 2015
9:06 a.m.

Case No. 1:13CV949

DAVID HARRIS, CHRISTINE BOWSER, and SAMUEL LOVE,

Plaintiff,

vs.

PATRICK MCCRORY, in his capacity as Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections,

Defendants.

TRANSCRIPT OF THE BENCH TRIAL VOLUME II OF III HELD BEFORE
THE HON. WILLIAM L. OSTEEN, JR., UNITED STATES DISTRICT JUDGE
THE HON. MAX O. COGBURN, JR., UNITED STATES DISTRICT JUDGE

THE HON. ROGER L. GREGORY, UNITED STATES DISTRICT JUDGE

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[260] I N D E X

WITNESSES FOR THE PLAINTIFF:	PAGE
STEPHEN DANIEL ANSOLABEHERE	
Direct Examination By Mr. Hamilton	262
Cross-Examination By Mr. Farr	331
Redirect Examination By Mr. Hamilton	417
Recross-Examination By Mr. Farr	421
WITNESSES FOR THE DEFENDANT:	
DAN FREY	
Direct Examination By Mr. Peters	431
Cross-Examination By Mr. Speas	458
THOMAS BROOKS HOFELLER	
Direct Examination By Mr. Farr	466

[261] October 14, 2015

(At 9:06 a.m., proceedings commenced.)

JUDGE OSTEEN: All right. Good morning, everyone. Mr. Hamilton, it looks like you're ready to proceed.

MR. HAMILTON: We are, Your Honor. At this point plaintiffs call Dr. Stephen Ansolabehere.

JUDGE OSTEEN: All right. Before he walks in the courtroom, so we have a motion in limine outstanding. We've taken that under advisement. The motion and the response and the reply seem to fairly frame the issues. Mr. Farr, anything – I'm not suggesting further argument is necessary, but anything further you want to add to what's been pretty thoroughly briefed already?

MR. FARR: Your Honor, we have no objection to the Court hearing the testimony and then ruling on the motion after you've heard what the expert witnesses have to say.

JUDGE OSTEEN: All right. Let's proceed ahead. We'll let those objections raised in the motions stand, so if there are additional objections during the testimony, make sure to make those. All right. Let's proceed ahead.

MR. HAMILTON: All right. Thank you. Doctor?

(Witness sworn by the clerk.)

MR. HAMILTON: And, Your Honor, we prepared witness notebooks which I believe the Court has in front of them.

[262] STEPHEN DANIEL ANSOLABEHERE,
PLAINTIFF'S WITNESS SWORN AT 9:07 a.m.
DIRECT EXAMINATION

BY MR. HAMILTON:

Q Good morning. Can you please state your name for the record, sir.

A My name is Stephen Daniel Ansolabehere, Stephen with P-H, and Ansolabehere is spelled A-N-S-O-L-A-B-E-H-E-R-E.

Q Thank you. Dr. Ansolabehere, you're an expert for the plaintiffs in this litigation?

A I am.

Q Let's start with Plaintiff's Exhibit 17 and 18. They're in the notebooks in front of you. Can you please take a moment to look at those exhibits and tell the Court what those are.

A Exhibit 17 is my expert report in this case, and Exhibit 18 is a reply report.

Q And do these reports contain your CV or resume?

A They do. Exhibit 17 contains my CV.

Q And can you point the Court to where that document begins.

A It begins after page 41.

Q Is that a complete and accurate summary of your educational background and professional experience, sir?

A It is.

Q Can you summarize briefly for the Court your background and training.

[263] A I received my Bachelor of Arts and my Bachelor of Science from University of Minnesota. I received my Ph.D at Harvard University in Government and political science. My first job was at UCLA as an assistant professor, and then I moved to MIT. I taught at MIT for about 14 years where I held the Elting E. Morison chair, and then I moved to Harvard University, and I've taught there since 2008.

Q And what degrees do you currently hold?

A Bachelor degrees, Ph.D, and in passing I received a master's degree.

Q And what is the field your Ph.D was granted?

A Political science.

Q And have you attended law school?

A No.

Q Not a lawyer?

A No.

Q Where are you currently employed?

A I currently work at Harvard University.

Q And where else have you taught?

A UCLA, MIT, and Harvard.

Q And at Harvard, what are your principal areas of research and study?

A My principal areas of research and study are voting behavior, elections, representation, American Government generally. I teach the graduate and undergraduate Ph.D level [264] and undergraduate courses in American Government. I teach statistical methods in social sciences as well.

Q And have you published any peer-reviewed articles or studies in the area of redistricting?

A I have, as well as a book.

Q As well as a book; is that what you said?

A Yes.

Q Okay. Can you describe those – that book – well, let's start with the book. What was the book?

A The book is called *The End of Inequality: One Person, One Vote and the Transformation of American Politics*.

JUDGE OSTEEN: Doctor, that microphone, the more you can kind of keep it directly in front of your face –

THE WITNESS: Got it.

JUDGE OSTEEN: There you go.

MR. HAMILTON: All right. Thank you.

BY MR. HAMILTON:

Q And what's the book about generally?

A The book is about the one person, one vote cases from the 1960s and how they changed American politics and the subsequent cases and the adjustment of the political parties, racial representation, and so forth.

Q All right. And you mentioned you published some other peer-reviewed articles or studies in the area of redistricting. Can you identify for the Court what those are.

[265] A Um –

Q Are they listed in your resume?

A They are listed. The articles and journals begin on page 2. I have a piece forthcoming in NYU Law Review called Testing *Shaw v. Reno*.

Next piece would be from Harvard Law review in 2013, Regional Differences in Racially Polarized Voting.

Following that 2013 as well, The Effects of Redistricting on Incumbents in the Election Law Journal.

Following that, Partisanship and Public Opinion on Redistricting in 2010, also in the Election Law Journal.

Following that in 2010 as well, Race, Region – whoops, a typo – Race, Region, and Voice Choice in the 2008 Election, also in the Harvard Law Review.

Q All right. We can stop there. They're all listed, safe to say, in your CV?

A Yeah.

Q Who else teaches and writes in this field of study?

A Other political scientists include Bernie Grofman at UC Irvine, Bruce Cain at Stanford, my colleague Nate Persily also at Stanford, Charles Stewart at MIT, a long list. It's a very substantial part of our discipline.

Q And you know these gentlemen?

A Yes.

Q And you work with them?

[266] A Yes.

Q Do you have expertise outside of academia with redistricting?

A Yes, I do.

Q And could you describe to the Court what that is.

A I've worked as an expert witness in about a dozen cases.

Q And in what context?

A In redistricting cases and other voting rights cases since 2011.

Q So let's start with what states have you appeared in as an expert witness in connection with redistricting?

A In connection with redistricting specifically, in Nevada, the case of *Guy v. Miller*.

In Florida, a series of cases. The first was a proceeding in the Florida Supreme Court. It was essentially kind of a facial review of the House and Senate plans and then the subsequent lawsuit in the Congressional Plan called *Romo v. Detzner*.

In Virginia, the *Harris* – the plan involving the House – I'm sorry – the dispute involving the House of

Representatives districts that's currently before the Court. The trial is already finished, but the decision is yet to come.

In the state of Texas, a series of cases. The Section 2 and Section 5 and Section 3 cases involving the Texas redistricting dispute. All those trials are finished. [267] Section 2 and Section 5 – the Section 5 dispute was settled and vacated by – that was vacated by the Supreme Court when Section 4 was overturned, but – and the Section 3 dispute, the trial was held last summer, and we're waiting for a decision.

Q You testified as an expert in each of those matters?

A Correct.

Q In each of those matters, were you accepted as an expert witness by the courts hearing those cases?

A I was.

Q Has any court in any jurisdiction in any matter in which you've appeared ever rejected you as an expert in your field of study?

A No.

Q Let me just ask you about one item on your resume. I believe it's on page 13. It says CBS Election Decision Desk 2006 to the present. What is that?

A Since 2006, I've worked on the CBS Election Decision Desk. That is the group of people brought in by CBS Nightly News to call the election on election night. We use past election data, registration data, census data to make models to forecast what the election will likely be. Then over the course of the night, we receive realtime data on votes in the individual precincts and the exit polls to make projections about which congressional districts, which

states, and – for senate, governor, and president, have been won by each of the [268] candidates and make projections about who has won the presidency, the House, the Senate, and the governorships.

Q And you've done that for about nine years now?

A Yep, every general election and also the primary elections for the president.

Q How's the track record of the team for the Decision Desk in projecting the results of elections so far?

A The team has not had to walk back any decisions we've made, and we haven't missed anything.

Q All right. Thank you.

MR. HAMILTON: Your Honors, at this point, pursuant to Evidence Rule 702, I would proffer Dr. Ansolabehere as an expert in the field of electoral politics, voting behavior, and statistical methods.

JUDGE OSTEEN: Any voir dire?

MR. FARR: I'll save it for the cross, Your Honor, and I will say we don't – we're not arguing that

Dr. Ansolabehere is not a distinguished political scientist. Our argument is that the methodology he used in this case is inappropriate because of a ruling by the US Supreme Court. JUDGE OSTEEN: All right. I'll then admit

Dr. Ansolabehere as an expert witness in the field of – could you repeat that again?

MR. HAMILTON: Sure, electoral politics, voting behavior, and statistical behavior.

[269] JUDGE OSTEEN: In the field of electoral politics, voting behavior, and statistical methods. You may proceed.

MR. HAMILTON: Thank you, Your Honor.

BY MR. HAMILTON:

Q Let's turn to your work specifically with respect to this case, Doctor, and I believe you identified Exhibits 17 and 18 as your reports in this matter, is that correct?

A Correct.

Q What was the purpose of preparing these reports?

A The purpose for preparing these reports was to analyze the Districts CD 12 and CD 1 in North Carolina and assess the racial composition and racial representation.

Q And are they complete and accurate descriptions of your analysis and methodology?

A They are.

Q Do they contain a summary and explanation of your analysis of – in this case?

A They do.

Q All right. What were you asked to do specifically? Is that contained in your report somewhere?

A It is. On page 3, paragraph 4, I was asked to assess whether race was a predominant factor in the configuration of CD 1 and CD 12 in North Carolina.

Q And what materials did you review in order to form an opinion and prepare the reports before the Court?

[270] A I reviewed maps, election data, registration data, census data. All that information was provided through the General Assembly's website.

Q Did you feel you had an opportunity to review all of the materials necessary to reach the conclusions that you've provided in your reports?

A I did.

Q And were you able to reach a conclusion with respect to whether race predominated in the drawing of CD 1 and CD 12 in North Carolina?

A I did.

Q And what is that conclusion?

A My conclusion was that race was the predominant factor.

Q All right. With respect to both districts?

A Yes.

Q Okay. Let's just – let's just briefly identify for the Court how you reached that conclusion, and then we'll walk through the individual steps of your analysis in a minute. But I think it might be useful to hear a roadmap first, sort of like a skeleton outline of what was your steps of how you got there.

A Okay.

Q Can you describe that.

A So the main things I looked at was, first, the geographies of the districts, especially compactness and crossing of county [271] and city lines.

The second thing I looked at was the racial composition of the districts relying primarily on census data. The third thing I looked at was the areas in which the districts were located and the counties in

which those districts were located and the parts of the population of those counties that ended up in the districts and the parts of population of those counties that ended up outside the district.

Then I looked at the movement of Voting Tabulation Districts in and out of the district. Voting Tabulation Districts are a small census area, roughly equivalent to a precinct. So I was looking at how the areas got moved in and out of the district as it was reconfigured from the benchmark map from 2001 to 2011 into the Rucho-Lewis map in 2012.

Then finally, I examined whether race predominated over party in the configuration of the districts by looking at registration data and related electoral data.

Q And did these separate analyses point in different directions or in the same direction?

A They all told a pretty consistent picture about the districts.

Q Okay. Well, let's start with step one of your analysis. I think you said that was geography including compactness and VTD or jurisdiction splits. Why does compactness matter in [272] these cases?

A Compactness is a traditional redistricting principle. It's looked at a lot. It's kind of something we look at to see whether or not there's something unusual about the configuration of districts. It's more of a red flag. There's not a clear, clean standard like this is the bright line we draw for compactness. But when we see a substantial reduction in compactness or highly non-compact district, it just sort of flags that we should take a closer look.

Q And why? What might that tell us? Why is it a red flag?

A It forces the analyst, somebody like me, to ask what additionally happened to the district, why was the district configured this way, what was the objective, or what was the effect?

Q And were you able to reach a conclusion with respect to the geographical compactness of these two districts, CD 12 and CD 1?

A I was.

Q And what was that opinion?

A My opinion was that CD 1 saw a substantial reduction in compactness. There are different measures for compactness. I looked at two. One is the spread of the area, and one is the configuration of the perimeter, and both of them showed – both measures showed that there was a pretty substantial reduction in compactness of CD 1. There was also a substantial reduction [273] in compactedness in CD 12, but CD 12 is also highly non-compact so it wasn't too much further to go, but it went even further along that standard.

Q So how does a social scientist measure compactness?

A There are a lot of different measures of compactness, but I think there are two big concepts. One concept is how spread out is a district in terms of its area, and the other is how unusual or jagged is its boundary compared to a district with similar area.

Q And what is the commonly used measure of compactness in a redistricting analysis in most of these court cases?

A The Reock measure is probably the most commonly used, and it's a measure that was developed in the 1960s by a man named Reock.

Q And how do you spell that?

A R-E-O-C-K.

Q And can you describe how that test works?

A That test is to imagine the most compact possible area. The most compact possible area is a circle. So compare the area of a hypothetical district, which would be eye circle – and every once in a while we do see a district that is about the shape of a circle in some states – and then compare the area of that circle to the area of a given width to the area of the district that is of the same length, okay. So the district may be 120 miles long. So how big would an area of a circle be [274] that had a diameter of 120 miles, and now what's the area of that circle compared to the area of the actual district?

Q And what are the range of scores for Reock?

A So the area of the districts in the top and the area of the circles in the bottom, and that ratio ranges from zero to one where one would be most compact district, a circular-shaped district. A district that's a perfect square based on simple geometry would have a Reock of .64 always.

Q What was the Reock score of the original gerrymander?

A So there were two original gerrymanders back in 1812 drawn by Elbridge Gerry in Massachusetts. One was a state senate seat and one was a congressional seat. The state senate seat had a Reock of .19, and the state – the congressional seat, I believe, had a Reock of .28.

Q And how did that compare to CD 1 and CD 12 in the Rucho-Lewis map?

A Under the Rucho-Lewis map, the Reock of CD 1 is, I think, .29, which is about the same as the original gerrymander, and then the Reock of CD 12 is .07. That is the area covered by CD 12 is 7 percent of the ideal district area.

Q Fair to say that's lower than either of the two original gerrymanders?

A Correct.

Q Are you familiar with the interocular measure?

A Yeah, my colleague Bernie Grofman likes to call the visual [275] inspection of the map the interocular measure, how does it look.

Q How does it look. So what criteria are generally considered traditional redistricting criteria?

A In addition to compactness, contiguity, make sure all the pieces actually stick together. Respect for political boundaries such as counties and towns because the counties and towns administer the elections. The more you cross them up, the more you split those counties, the harder it is to run elections, the more complications you create for the administrators. Respect for local communities, and that's often reflected also in splits of counties and towns because people tend to live in cities or in counties.

Q And where you see traditional redistricting criteria ignored or violated by highly non-compact districts or split counties or jurisdictions, is that significant in your analysis?

A Again, in some states there are state laws that have requirements that you violate certain standards. But for me as an analyst looking at electoral census data and so forth, it's more raising a question of like

what was – what happened here? Was this more motivated by one other objective such as party or race?

Q So looking specifically at Congressional District 1, how did that change from the benchmark map to the enacted map, the [276] Rucho-Lewis map?

A The geography of the – the district was underpopulated by about 97,000 people, so it had to obtain about 97,000 people to adhere to one person, one vote, and the district shifts – it sort of recedes slightly from Eastern Tennessee – Eastern North Carolina and grabs a portion of Durham.

Q And how did that affect the compactness? How does compactness change from the first – from the benchmark –

A It reduced the compactness –

Q By how much?

A Depends on the measure. In the Reock, it reduces it from .39 to .29, I recall. In the area-to-perimeter measure, I think it went down from – I think it was cut by about 50 – cut in half.

Q And did you report those numbers in your report somewhere?

A Yes, in Table 1.

Q Could you tell us what we're looking at in Table 1 of Exhibit 17 which is the – your initial expert report?

A So the first two columns correspond to the Reock score under the benchmark map, the 2001 to 2011 map, and the second column in there is the Rucho-Lewis map. The first row is District 1. So the Reock score was reduced from .39 to .294.

Q So how much of a reduction is that with respect to CD 1 expressed by percentage?

A So it's a drop of .1 in Reock, and it depends if you [277] use – which you use as the baseline. But it would be a reduction of 25 percent in one case if you use the baseline as the denominator, about 35 percent if you use the other.

Q Okay. Is that significant in your expert opinion?

A Yes. And in the case of the area-to-perimeter ratio, that's for every mile of perimeter for a district how much area in square miles is being incorporated. So as you draw a line around – if you drew a line around it, how squiggly is that line? The squigglier the line, the less area you're taking in for every mile, so the more contorted the line is.

Here, the reduction is for every – the ratio of the area to the perimeter is out 11,000. That's pretty compact for every line. That means the lines are pretty smooth. Then it's cut in half roughly down by about 40 percent under the Rucho-Lewis map so that's a substantial reduction as well.

Q Are there other districts in the Rucho-Lewis map that are also non-compact, that is, had their compactness drop between the benchmark and the enacted plan?

A Yes. If you read down for each row, you can see the changes in compactness. District 4 had a substantial reduction in compactness by both measures, District 6 had a substantial reduction in compactness by Reock, but not by area of the perimeter. District 9 had a substantial reduction in compactness. District 11 had a reduction in compactness, and District 12 had a reduction in compactness.

[278] Q All right. I believe you said you also looked at how the plans treated local political subdivisions like counties, cities, and Voting Tabulation Districts, is that right?

A That's right.

Q And how did CD 1 fair by that by that measure?

A CD 1 increased the numbers of county splits considerably. I think there were nine county splits under the benchmark map, and there were 18 county splits by my count, but plus one – Beaufort county has a small split. It's kind of trivial, so I didn't really count it as a split originally.

Q Okay. And how about cities or towns in CD 1?

A I'd have to look at the number. The report on page 6, paragraph 13, presents the county splits, and there are 22 city and town splits in CD 1.

Q All right. Let's turn to Congressional District 12 now. How did that fair in terms of compactness in the change from the benchmark map to the enacted map?

A CD 12's Reock score was reduced from about .116, I think, to .07. So it's a four-point reduction, but we're already in a highly non-compact district, so the percentage reduction is pretty substantial.

Q What was the typical Reock score for a district – the congressional districts in the Rucho-Lewis map?

A State-wide if you took all the states, the average district had a Reock score of .377.

[279] Q All right. And how did that compare to the Reock score in the Rucho-Lewis map for the CD 12?

A The CD 12's Reock score is .07. So that's five times – the average district is five times more compact than CD 12.

Q What was the least compact district in the state?

A CD 12.

Q And is that – I guess the compactness scores are also recorded on Table 1 of your report, Exhibit 17?

A Correct.

Q And how much, expressed as a percentage, did that change from the benchmark to the enacted plan? The benchmark was already a non-compact district, wasn't it?

A Yes, it was.

Q So how much did it change? How much did we come even more –

A .04 divided by .11, which is going to be about a 37 percent reduction.

Q Okay. Aren't there other districts that are also non-compact in the Rucho-Lewis map?

A Yes.

Q Okay. So why is this particularly significant as to CD 12 or CD 1 if there are other non-compact districts as well?

A Again, we use compactness to look for sort of red flags, there's something going on and something unusual, was there a reduction, should we look closer at the district?

[280] Q All right. So CDs 4, 6, and 9 border on CDs 1 or CD 12, correct?

A Correct.

Q Are they affected by the changes to the two districts at issue here?

A Yes, as the boundaries of CDs 1 and 12 become less compact, the boundaries of the neighboring districts can become less compact as well, and in this case there were substantial reductions in the compactness of the bordering districts.

Q Okay. And how about new CD 11? What controlled it's shape?

A CD 11 is on the far western end of the state, and it's defined – its compactness is defined by the shape of the state. So that's a case where the boundary of the state will affect the compactness, but neither CDs 1 or 12 are affected appreciably by the boundary of the state, 12 not at all.

Q All right. And then just to close this off, on CD 12, how did that do with respect to or respect for local political subdivisions and VTDs?

A CD 12 in both the benchmark map and in the Rucho-Lewis map divided six counties, and I think it divided the same number of cities and towns, which is about, I think, 13.

Q All right. Now you – I believe the second thing you looked at or – was the number – you were examining the question of whether race predominated in the changes in these [281] districts, correct?

A Correct.

Q Okay. So how did the black – how many majority-black congressional districts were there under the benchmark map?

A Under the benchmark map, there were no districts in which blacks were a majority of the black voting-age population.

Q What was the black voting-age population in CD 1?

A The racial composition of districts is recorded on page 8 of my report. CD 1, 48.6 percent of the voting-age population was black and CD 1 under the benchmark.

Q Now, we've had some discussion about how the census measures who is African-American for the purposes of these calculations and who is not. Can you explain the different census categories of reporting your ethnicity, how does that work under the census?

A Census asks two questions on the enumeration form. It asks your race, and it asks your ethnicity. Race is are you white, black, Asian, native American, or Pacific Islander, multi-races or other. You can check any number of boxes. You can check black and move on, or you can check I'm black and I'm Asian, or you can check multi and black. So you can check any number – the census allows you to check any number of boxes.

Q So just focusing on that, if they check just black, then how is that number reported in the census totals?

A That person would be counted as black.

* * *

[283] discussion about ethnicity. So how does – does the census ask about ethnicity as well?

A Yes, the ethnicity question is simply "Are you Hispanic?"

Q Okay. And is that reported separately?

A Yes.

Q So it doesn't have anything to do with the BVAP numbers?

A Correct.

Q All right. So I think you said a moment ago the black voting-age population for CD 1 was 48.6 percent, is that correct?

A Correct.

Q Under the benchmark plan?

A Yes.

Q How about CD 12? What was, under the benchmark plan, the black voting-age population of CD 12?

A 43.8.

Q Okay. So neither district was a majority-minority district?

A Correct.

MR. FARR: Objection to the form.

JUDGE OSTEEN: I'll overrule.

BY MR. HAMILTON:

Q What's more important for the purposes of this analysis, black voting-age population or total black population regarding – regardless of whether it's voting-age or not?

[284] A Usually, we look at black voting-age population because that's a measure closer to the size of the electorate.

Q All right. At the time of the – at the time the Rucho-Lewis plan was adopted, who were the two incumbent representatives in these two congressional districts?

A In CD 1 it was G.K. Butterfield and CD 12 Mel Watt.

Q And do you know their race?

A Both are African-American.

Q So do you know whether the African-American community was able to elect a candidate of choice in CD 1 under the benchmark plan?

A Under the benchmark plan, Butterfield won every election.

Q So the answer is yes?

A Yes.

Q And how about in CD 12? Under the benchmark plan, was the African-American community able to elect their candidate of choice under the benchmark plan in CD 12?

A In CD 12, the African-American community was able to elect Mel Watt.

Q And for how long was that true? When we look back over historical elections, how long had the African-American community been able to elect their candidate of choice in each of these two congressional districts?

A CD 12, I believe, going back to the origin of the district. I'm not sure how far back CD 1 goes.

[285] Q Fair to say at least 10 years?

A Yes.

Q In the last decade, has the African-American community's candidate of choice ever been defeated in any election in either of these two CDs?

A No.

Q So if we were just to look at historical elections alone, is there any evidence that the white voters in either CD 1 or CD 12 have voted as a bloc to defeat the

candidate of choice of the African-American community in either district?

MR. FARR: Objection, Your Honor. There's no evidence that whites were in the majority in either one of these districts. He's asking the professor an impossible question.

MR. HAMILTON: May I respond, Your Honor?

JUDGE OSTEEN: Yes.

MR. HAMILTON: I'm not, and I actually didn't suggest that whites were in the majority at all. The question was is there any evidence that the white voters, however many of them there might have been in either district, have voted as a bloc to defeat the candidate of choice in either of these districts.

MR. FARR: Well, if they voted as a bloc, they couldn't seat them because they weren't in the majority.

MR. HAMILTON: With all due respect, Your Honor, of course they could. You don't need to be a numerical majority [286] in order to defeat the candidate of choice. You simply form a coalition of conservative members of – October 14, 2015. October 14, 2015.

JUDGE OSTEEN: Well, there are a number of assumptions in the question, and I don't know how long we've had a CD 1 and a CD 12 when we're talking about historical information. I understand there's – CD 1 and 12 are at issue and as they are currently – at least roughly as they currently exist were created back in the '90s, but there may have been at least a CD 1 prior to that time that's not at issue in this case. The historical part of the question brings up a lengthy history, number one; and number two, it seems to me, that – let me ask before I say anything else.

JUDGE OSTEEN: All right. I'm going to let you rephrase the question to make it a little bit clearer in terms of the – at least the timeline of what you're inquiring about. Number two, with that clarification, Mr. Farr, I'm going to overrule the objection and simply note that to the extent there are a number of assumptions that may be underlying any response that's given, those can be cleared up on cross-examination, and we're a panel who's capable of sorting that out.

MR. FARR: Thank you, Your Honor. I think that's very wise.

JUDGE OSTEEN: You may proceed.

MR. HAMILTON: Thank you, Your Honor.

[287] BY MR. HAMILTON:

Q Okay. So let me rephrase the question. Looking just at the last 10 years of election data, the basic configuration of CD 1 and CD 12, in that configuration, is there any evidence that white voters in either of these two districts, CD 1 or CD 12, have voted as a bloc to defeat the candidate of choice of the African-American community during that time frame?

MR. FARR: Your Honor, I know you're going to overrule this, but I'm objecting to the question again.

JUDGE OSTEEN: I note the objection. You may answer.

THE WITNESS: So the evidence, as I see, it is that the white community, however they voted, were not sufficient to defeat the African-American candidate. So for both districts over the past decade, the African-American candidate and the African-American community were able to elect their candidate regardless of what the white vote was, how cohesive it

was, or not. I wasn't asked to do a racially polarized analysis in this case, so I have no information about how cohesive the whites were in this area or not.

BY MR. HAMILTON:

Q Okay. Thank you. So what happened to the black voting-age population in these two congressional districts under the Rucho-Lewis map, increase, decrease, stay the same?

A Under the Rucho-Lewis map, the black voting-age population in both districts increased.

[288] Q To what?

A The black voting-age population of CD 1 increased to 52.7 percent, and the black voting-age population of CD 12 increased to 50.7 percent.

Q So in CD 1, the black voting-age population went from 48.6 percent BVAP to 52.7 percent BVAP, is that correct?

A That's correct.

Q And in CD 12, it went from 43.8 to 50.7 percent black voting-age population, is that correct?

A That's correct.

Q All right. Now, you examined the question of whether race predominated in the drawing of these two districts, and you conducted two different types of analysis. One I think you referred to as the envelope analysis, and another was movement of VTDs in and out, is that right?

A Correct.

Q So let's start with the envelope analysis. Can you explain to the Court what that is and how you went about doing it.

A So the idea is the whole map isn't at issue here, just two districts; and in doing an analysis, I would have to focus on the areas within the state where those districts are located. It couldn't be configured anywhere in the state, so the areas in the state where those districts are located. Based on traditional districting principles, the idea that you keep [289] counties whole to the extent possible, counties make sense as the initial cut at where those districts are located. What are the counties in which those districts take part or all of the county? Then ask the question what percent of the population from those counties was put into the districts and what percent of the black population and the white population were put into those districts?

Q Is this the first time you've done this kind of analysis?

A I did something similar in the Virginia case.

Q And which Virginia case was that?

A The Virginia House delegates case *Bethune-Hill versus State Board of Elections*.

Q Is that the case that's pending in the Eastern District United States District Court for the Eastern District of Virginia right now?

A Yes.

Q Did Dr. Hofeller also testify in that case?

A Yes.

Q Thank you. Now, your second analysis examines the VTDs that were moved in and out of the districts and their composition, is that right?

A Correct.

Q And why did you examine that?

A So another way to think about the area that the districts were located is to consider every Voting Tabulation District, [290] which is analogous to a precinct, that the state legislature considered part of the district in either the old map or the new map and then look at just those very narrowly contained areas. So one can think about the envelope of counties as kind of a less restrictive definition of the location of the districts and the VTDs as the more – a very restrictive definition of the districts.

Q And if the changes in the district lines were unrelated to race, what would you expect to see with respect to the VTDs?

A I would expect to see that the changes in the district lines wouldn't – that the VTDs – the inclusion of district's VTDs or the exclusion of VTDs wouldn't fall on racial lines, that the percent of the black registered or black voting-age population was brought in was about the same as the black population that was taken out.

Q All right. Have you seen this sort of analysis done in other lawsuits or litigation over redistricting?

A I did this in the *Bethune-Hill versus State Board of Elections* case. Michael McDonald did that – a similar analysis in *Page* – in the *Page* case, which is a congressional case in Virginia. My colleague Gary King did similar analysis in the Arizona congressional case.

Q Okay. And you applied both of these types of analyses to the two districts at issue in this litigation?

A Yes.

[291] Q So let's start with CD 1. What did the envelope analysis show with respect to North

Carolina's 1st Congressional District under the Rucho-Lewis map.

A With respect to CD 1, this analysis is contained on – starting on page 9, but mostly on 10. Page 9 is just the header. What it showed is that white registered voters were twice as likely to be – I'm sorry – black registered voters were twice as likely to be put in these districts as white registered voters in CD 1.

Q Did you summarize your analysis in a table in your report?

A Table 3 in my report shows that.

Q And where can the Court find that, what page?

A Page 24.

Q Okay. So let's take a look at that. Can you walk us through this table and what it's showing us first with respect to CD 1?

A So the top panel corresponds to CD 1 and the rows correspond to the different groups. One is the total registered population in that area, the second row is the white registered population, and the third is the black registered population. There are in this area a little under a million people in the counties where CD 1 is located. Of those, about half of that million people – those million registered people ended up in the district, CD 1.

Q And then what does the second and third line in that top [292] half show?

A The second line is the white registered. There are about 500,000 white registered voters in this area, and about a third of them, 35.7 percent, ended up in CD 1; and there are about 350,000 black registered voters, and 72 percent ended up in CD 1. So blacks

were twice as likely as whites in this area to end up in CD 1.

Q Okay. And you did the same analysis with respect to CD 12?

A I did.

Q And what did that show?

A In that area, the CD – the population in the county was much larger, about 1 1/2 million people, and about a third – about 30 percent of those people ended up – the registered people ended up in CD 1. Of that 1 1/2 million, slightly under a million were white. Only 16 percent of those whites ended up in CD 1. About 400,000 were black, and 64 percent, almost two-thirds ended up in CD 1.

Q And so how did those two numbers compare to each other? How much more likely is it that an African-American registered voter would have ended up in CD 12 than white registered voter?

A Four times more likely.

Q And what is the pattern that this shows when looking at these two districts from this envelope analysis?

A This indicated to me – again, I'm sort of coming in at a [293] high level and digging deeper. This indicated to me that there was a lot of racial sorting going on, that race was being – people – black people were put in these districts, white people were not put in these districts.

Q Okay. Now, you also described the VTD analysis. Did you summarize that analysis somewhere in your report?

A Voting Tabulation District analysis is shown in Table 4.

Q Okay. Can you – maybe we start with the conclusion and then walk us through how you got there. What did you find as a result of the Voting Tabulation District movement analysis with respect to CD 1?

A With respect to CD 1, I found that blacks were about twice as likely to be moved into the districts as moved out. In other words, the rate at which you were moving in blacks was almost double the rate in which you were moving them out.

Q Okay. And can you tell us – walk us through Table 4 on page 25 of Exhibit 17, your initial report.

A Okay. So the idea is that if I have a district, I have a set of Voting Tabulation Districts that were in the benchmark and in the Rucho-Lewis map. Some of those districts – some of those Voting Tabulation Districts remained in CD 1 under both maps. That we call the core. Some of those districts – Voting Tabulation Districts were moved out, and some of those were moved in. Some of those weren't in the – in other words, some of them weren't in the benchmark now were moved into the [294] map. Those are moved into the district. Some of them were in the benchmark and were moved out.

In the core, the percent black of the registered voters was 56 percent, and the percent white was 37 percent. The remainder were Hispanics and Asians.

The area moved – the areas moved in – Voting Tabulation Districts moved in had a black percent of 48 percent and a white percent of 37 percent. The areas moved out had a black percent of 27 percent and a white percent of 66.7 percent. So just comparing the areas moved in and the areas moved out, areas with higher black density were moved in and areas of higher white density were moved out.

Q So, again, the pattern you're seeing here?

A Again, dividing the – sort of – kind of sorting along racial lines.

Q All right. And then what did your analysis show with respect to the VTDs moved in and out of CD 12?

A In CD 12, the core was about 54 percent African-American and 32 percent white. The areas moved into the district were 44 percent African-American, and the areas moved out were 23 percent African-American. So it was about, again like CD 1, twice as likely to move – the area moved in had two times higher density of African-Americans than the areas moved out. The areas moved into the district had a white percent of 37 percent, and the areas moved out had a white percent of [295] 64 percent. So almost exactly the same pattern as we saw in CD 1.

Q Okay. And is that consistent with the findings that you found under the envelope analysis?

A Yes, very similar pattern. So this suggests to me that the conclusions I reach here are not a matter of how I defined the location of the area. I can take the broad definition of the counties in which the districts are located, or I can take the narrow definition of the areas moved in and out of the district and reaching essentially the same conclusion.

Q Did you prepare maps showing your analysis?

A Yes, the next step was really to look at, okay, what's happening at the boundaries. I've got increased compact – decreased compactness, county splits. How are those splits corresponding to the racial density in the areas?

Q Okay.

A So the maps I've prepared examine the boundaries of the districts under the benchmark map and under the Rucho-Lewis map in – around the areas included under the old plan and then taken out under the new plan.

MR. HAMILTON: Your Honors, may counsel approach the bench for a moment to discuss an issue?

JUDGE OSTEEN: You may.

(Bench conference as follows:)

MR. HAMILTON: I have a migraine starting that is [296] starting to affect my vision. It's not a big deal. I just need to take a couple of Advil, and then I can continue. It's not a problem. I don't think it's going to be a problem. If I'm not able to read, it will be, but I don't think that's going to be an issue.

JUDGE OSTEEN: All right.

MR. HAMILTON: It's just a little swirly thing right in the middle –

MR. FARR: Same thing happened to me, Your Honor, so we certainly would support taking a break.

MR. HAMILTON: I don't need –

JUDGE OSTEEN: Let's take 10 minutes, take your meds, and we'll see where you are, and let Ms. Powell know.

MR. HAMILTON: I'm sure I'll be fine. Thank you so much.

(Bench conference concluded.)

JUDGE OSTEEN: We'll be at ease for 10 minutes.

(At 9:57 a.m., break taken.)

(At 10:13 a.m., break concluded.)

JUDGE OSTEEN: All right. Mr. Hamilton, you may continue.

MR. HAMILTON: Thank you, Your Honor.

BY MR. HAMILTON:

Q Dr. Ansolabehere, I think we had just turned to the maps that you had prepared, is that correct?

[297] A Correct.

Q Okay. So those are located in Exhibit 17, page 26, map one and map two. So maybe – we've got map one up on the screen. Can you walk us through these maps and what they show.

A So I prepared eight maps. Maps one and two correspond to CD 1, and they just focus in on one part of the boundary, the eastern boundary of CD 1 in the area of Gates County, Chowan County, Perquimans County, and Pasquotank. This shows the boundary of CD 1 under the benchmark, and the green border is the CD boundary, and the black borders are the county boundaries. The shading area represents the density of black population in the areas and the lighter the area, the lower the black population; the darker the higher, the higher the black population.

Q All right. So map one is the – is this portion of the boundary of the 1st Congressional District under the benchmark plan.

A Correct.

Q And then what is map two?

A Map two shows this portion of the boundary under the Rucho-Lewis map. I focused on this area because this was an area where there were four additional county splits. Originally – none of the counties over here, Gates, Pasquotank, Perquimans, or Chowan were split under the benchmark, but here

is an area where we have four county [298] splits. I wanted to look more closely at why the counties were split and how the splits occurred.

Q And what does that show?

A What that shows is that – the red line is the new district boundary for CD 1 in this area, and it shows – it indicates to me that the areas included in CD 1 in the county splits had much higher black density than the areas excluded from the county splits.

In particular, in Chowan County, there are two Voting Tabulation Districts on the northern part of the county that have higher white density, and one on the southern part of the county that has a higher white density, and the three Voting Tabulation Districts in the county that had the highest black density are the ones that are included in CD 1.

As the district moves from Chowan into Pasquotank, you see the same pattern. The lighter shaded areas are excluded from the district. The darker shaded areas are the ones that are included.

Then as we move into Pasquotank, the district extends and grabs the city of Elizabeth, I think that is, and it's got a heavily African-American center to it. That's included in the district. The lighter shaded Voting Tabulation Districts on the southern part of the county are cut out, and a portion of the Voting Tabulation District on the north that's darker is included, and that's a VTD that's actually split.

[299] Then finally in Gates County, the center of Gates County has those kind of arms sticking up, those areas with the higher black population in the county, and the areas with the lower black population are excluded.

Q So as we flip back and forth between these maps, we can see the difference in where the lines are as they change between the benchmark and the enacted map?

A Correct, and it's the same black population data in both maps. The only thing different between the maps is the line of the district.

Q Okay. And if we look at – let's go back one map to the map one. The green line is the existing boundary. That's the sort of green line that goes from the roughly middle of the top of the page down towards – sloping towards the right?

A Correct, the top of the – the top is the boundary of the state. It's the boundary of North Carolina. Then between Gates County and Camden County at the very top is where the district starts, and it just cuts along the county boundary. The squiggly line that would look non-compact, that degree of non-compactness is due to the county boundary.

Q Okay. And then we flip forward to the next map. The red line shows in the enacted plan what happened to that green line and where it moved?

A Correct. The beginning of the district along the northern boundary of the state starts all the way on the other side of [300] Gates County and cuts along the Gates County boundary on the west, cuts into Gates County, grabs that black population, continues down on –

Q So maybe I could just interrupt you for a second. So it goes around that one white pocket there. To avoid it, it goes down below that, and then comes back up north?

A Correct.

Q And then it describes what looks to me like kind of a horse head as it moves around, and that's all greater density African-American community?

A Correct. And then it dives down south along the western border of Chowan County, and Chowan was entirely in the district before. It swings around the Voting Tabulation District that's very lightly shaded. That means it's got a high non-African-American population. It then cuts around top of those VTDs to include the higher density Voting Tabulation District African-Americans.

Q All right. So in looking at this map, is it consistent with your envelope and VTD analysis or inconsistent?

A Completely consistent. It's sort of a nice demonstration of the Voting Tabulation District analysis. The Voting Tabulation Districts kept in the core would be the portion of Gates that is highly African-American compared to the rest of the county, and the portion taken out would be those Voting Tabulation Districts that are moved into District 3. [301] Similarly, down in Chowan County, the very white VTD there would be a VTD moved out, high white, compared to the VTDs moved that were kept in the core which is high African-American percentage.

Q All right. Let's switch gears and turn to the 12th Congressional District. You did the same series of analyses you did 12 Congressional District as you did for CD 1, correct?

A Correct.

Q So what did the envelope analysis show with respect to CD 12.

A CD 12 recalled the envelope analysis showed the black registered voters in the county were four

times more likely than the white registered voters to be placed in CD 12 in the counties.

Q And is that information collected on your Table 3? We already looked at Table 3 with respect to this.

A Correct.

Q And you also looked at the VTD splits with respect to CD 12?

A I did.

Q And what did that analysis show?

A The splits or the –

Q The VTDs. I'm moving through this because I think we already covered this when we looked at the tables the first time.

[302] A Okay.

Q So CD 12?

A CD 12 in Table 4 shows the composition of the core, the area – the VTDs moved in and the VTDs moved out.

Q All right. And did you prepare similar maps for CD 12 as you did for CD 1?

A I did.

Q Okay. Let's take a look at those. Is that Map 3 on page 28 of Exhibit 17?

A Yes.

Q Okay.

A Map 3 shows the Mecklenburg County area, Charlotte is in the center, and this is the map as it was configured under the 2001 to 2011 districts.

Q Okay. So same display here? The darker the coloration, that means a greater concentration of

African-Americans. And a lighter coloration means a lower concentration of African-Americans?

A Correct.

Q And then what is Map 4?

A Map 4 is the corresponding area for the Rucho-Lewis map.

Q And what does this show us?

A Again, it's the same data for racial composition and Voting Tabulation Districts. The red line corresponds to the district boundaries in this map compared to the green line in [303] the prior map, Map 3, which would be the district boundaries under the benchmark.

Q So if we go back and forth between these two maps, we can see the change from the benchmark to the enacted plan at least with respect to this portion of CD 12?

A Correct.

Q And what does it show us? What's the conclusion that you draw from this?

A So if we – the area of Mecklenburg County was already pretty divided along racial lines, and CD 8 took a fairly white portion of the county in the south. The reconfiguration of District 12 divided Mecklenburg County into just CDs 9 and 12. CD 9 comes in from the north here. So up in the north, it's coming down, and then it wraps around Charlotte all the way around and then grabs the area that was in CD 8 before but also changes the boundary down in the southern part. So you can see that the red arm cuts into Charlotte, and it just snakes in. It really follows the density of African-Americans in this area. So the

whiter areas are put at 9 and the blacker VTDs are put in 12.

Q And what is the pattern you're seeing here?

A Again, this seems to be sort of dividing the VTDs or sorting the VTDs along percent black versus percent white.

Q Okay. So what is Map 5 and 6 in your report? I believe they're contained on page 30 and 31 of Exhibit 17.

[304] A Maps 5 and 6 move up to Forsyth County area. So it shows CD 12 in the Forsyth County area under, in the case of Map 5, the benchmark map and, in the case of Map 6, under the Rucho-Lewis map.

Q So, again, as we flip back and forth, we can see how these changed and what is the change that you observed?

A So under the benchmark map, the green line – could you go back to the benchmark map, please, Stacy? You see the green line for CD 12 captures the center of the county, and it's got very dense African-American area in the middle, spreads out, but it includes some of the less densely African-American populated VTDs as well. There's some division along racial lines already; but as we move to the next map, the boundary has changed to really contract and really follow the lines of the higher African-American VTDs in the center of the city.

Q And, again, what's the pattern that you're seeing here between the –

A Again, it's really following the – seems to be following the areas with higher African-American Voting Tabulation District are kept in CD 12, and the areas that have whiter populations are put out.

Q All right. And then Map 7 and 8, can you describe –

A Map 7 and 8 move over to Guilford County.

Q So Map 7 is the benchmark mark, 8 is the enacted plan?

A Correct.

[305] Q And can you describe for us briefly what you conclude from these two maps?

A Briefly, what I conclude from these maps is that the reconfiguration of CD 12 in the Guilford County area took out the whiter part of the Greensboro area, especially the northwestern corner of the city, and kept in the more heavily African-American areas in the south and east of the city. And also the reconfiguration in the connection of the – this part of the district to the rest of the district followed more heavily African-American VTDs. So the connective tissue between the cities was following the African-American population as well.

Q And, again, what's the pattern you're seeing here?

A Again, I'm seeing that the VTDs moved out because they reconfigured the lines at higher white proportions relative to the areas that were kept in or moved in.

Q Thank you. Now, I'm going to change gears here a little bit. Did you consider the possibility that it was politics that drove these maps, not race, that this was all about politics? Did you consider that?

A Yes.

Q And how did you go about doing that?

A So if I approached it considering the political versus racial question was to see if party registration information was a better predicator of which VTDs are included in these [306] districts and the populations included in the districts or whether racial information, and I relied on voter registration data as that information is presented by the state and on the General Assembly's website at the – and that information is individual-level information. It tells me how many people consider themselves black and Democrat, Republican and Democrat, undeclared status and Democrat, black – white and Democrat, white and Republican, and white and undeclared.

Q And if you don't have individual information down to the individual voter, then how do you determine – you know, obviously you can't ask the people how they voted, so how do you determine how blacks and whites vote? How does a social scientist approach that question?

A You look at the relationship across Voting Tabulation Districts between the percent black and the – or percent white and the vote for a specific candidate.

Q Is there a name for that kind of analysis?

A That would be – one form of that analysis is racially polarized voting analysis, also an ecological regression analysis or an ecological –

THE REPORTER: I'm sorry, can you repeat that.

THE WITNESS: Another form would be an ecological regression analysis and also an ecological inference analysis.

BY MR. HAMILTON:

Q Okay. Is the individual voter level information [307] preferable or less preferable to a social scientist in examining these electoral behavioral questions?

A Individual level data is almost always preferable.

Q Okay. But there's this question that's been raised about the *Cromartie* decision and whether or not the registration information is aligned with actual voter behavior. Did you take that into account, sir?

A I did.

Q And how did you – did you determine in these congressional districts in North Carolina whether voter registration aligned with actual voter behavior not to de-validate the use of registration information?

A We don't know how individuals voted, right. Unlike the registration data where there's an explicit statement of what my party preference is, I don't know how anybody voted. So I stepped back and took the same approach I would take if I only had data aggregated to the voting tabulation data level, and I looked at the correlation between the percent registered Democrat and the percent vote for candidates – Democratic candidates and specific races percent Republican and so forth.

I also looked at that same relationship for percent registered as black, percent registered as white, and its relationship to the vote for candidates. Also, the relationship between black voting-age population, because normally what you would do in the absence of registration data, [308] such as North Carolina collects – just as an aside, only nine states have race on the voter files. So you can't normally do such analysis. In the absence of that data, you'd look at the relationship between black voting-age population at

the voting tabulation level and its correlation with a relationship to electoral results.

So I looked at a range of these analyses, and we normally look at such data in doing election analyses, say for the Election Decision Desk and academic research.

Q Not unusual to use that kind of data if you've got it.

A If you've got it. Again, it rarely exists.

Q And were you able to identify correlation or validate the use of voter registration information in this instance?

A Yes.

Q And how close was that correlation?

A It was very high, varied somewhat across races. For the racial data, so black registration and white registration, I found that black registered voters – percent black registered voter in the Voting Tabulation District correlated about – over .9, I think it was .92, with the fraction who voted for Obama in 2008, and white registration – in the area of CD 12, the white registration correlated .9 – negative .93 with vote for Obama. So the higher the racial registration in a Voting Tabulation District, the higher the vote for Obama.

I also did that analysis in CD 1. I think the [309] correlation was more on the order of .82 to .85, somewhere in that area, and I did it state-wide, and state-wide I found that the correlation between racial registration and the vote for Obama was actually much lower than in these two areas.

Q Okay.

A So that's one example of the sort of analysis that I did to confirm that the registration data was a pretty good indicator of voting behavior.

I also looked at the black voting-age population to see whether I'd prefer to do a more conventional analysis using black voting-age population and found that the black voting-age population correlated much more weakly with the Obama vote so that the black registration was actually a much better indicator of voting behavior than the black voting-age population was. So the correlations, I think, were on the order of like .5 to .6 as opposed to .8 and .9.

Q Let's start with your envelope analysis. What did your envelope analysis show with respect to CD 1 and CD 12 with respect to whether politics or race more powerfully explains how they were drawn?

A Generally, it showed that racial – race was a much more powerful factor in understanding which areas – which voters in the area of these counties was included in the districts than party was.

Q So is this Table 5 of your report?

[310] A Table 5 presents the envelope analysis for CD 1.

Q Okay. Can you walk us through Table 5. It's page 34 of Exhibit 17?

A So what Table 5 does is it takes all the black – all the Democratic registrants, all the Republican registrants, and all the Independent registrants and groups them and then examines the white Democrats and the black Democrats and the percentage of white Democrats included in the district and a percentage of black Democrats included in the district. Then for Republicans, it calculates percentage of white Republicans included in the district and the

percentage of black Republicans included in the district, the percentage for undeclared – of white undeclared who were included in the district – and, again, these are anybody in these counties – and the percent of black undeclared who were included in the district.

Q And what did that analysis show?

A That analysis showed that inside every partisan group, blacks were about twice as likely to be included in this district as whites; that is, if I look at the first row – or first cluster, or group, of Democrats, 72 percent of the black Democrats were put in this district. So 72 percent of black Democrats who lived in these counties, these 23 or so counties, were included in CD 1 compared to 42 percent of the white Democrats.

[311] But then when I turn to the Republicans, I find that 69 percent of black Republicans – and they're not as common as white Republicans – if you're a black Republican, you had a 69 percent chance of being put in this district compared to 30 percent white Republicans.

Then when we turn to undeclared, 68 percent of black undeclared were put in these districts compared to 35 percent of white undeclared.

Notice black Democrats, black Republicans, and black undeclareds had almost exactly the same chance of being put in these districts, about 70 percent, compared to white Democrats, white Republicans, and white undeclareds, and their range was about 30 to 40 percent. That's a very big difference within each partisan group.

Now, if I turn that around and look at the data another way and say, well, what if I compare the data

in some different ways, I'm going to – we'll get to that, but we're going to find that this is race – the effect of race, the difference between racial groups controlling for party, and there are big differences, about 30 percentage points here. If I do it the other way and do party controlling for race, that is, a group by racial groups, I don't find any differences that are substantial.

Q Okay. So let's turn to the next table, Table 6, in your report. Can you describe what this table is telling us.

[312] A Table 6 shows the same analysis using the same data but under the Rucho-Lewis – under the benchmark map. The first table showed under the Rucho-Lewis map. So just a comparison, how did it change from the benchmark to the Rucho-Lewis. I calculated the same data, and that's shown in Table 6.

Q And what did you conclude by comparing the two?

A I concluded there were differences, but the differences – between the racial groups within each party group, but the differences were much smaller.

Q In the benchmark?

A In the benchmark.

Q All right. How about CD 12? What did your analysis show with respect to CD 12? Similar or a different pattern?

A My analysis showed a very similar pattern, even a little bigger differences between the racial groups –

Q When you say "bigger," bigger as compared to what?

A Bigger racial differences within the party groups compared to CD 1.

Q Compared to CD 1, okay. So this is Table 7 of your report, Exhibit 17?

A Correct.

Q Okay. Can you walk us through your analysis in Table 7 here, if you could.

A So this table parallels Table 5 for the Rucho-Lewis map, and it calculates for Democrats the percentage of black [313] Democrats included in the map, in the CD 12 map in – among the counties in which that district was located and the percentage of white Democrats included in CD 12 from the counties in which it was located.

Q And what was the difference between white Democrats and black Democrats in CD 12?

A The difference about 47 percent. So 65 percent of black Democrats in these counties were included in CD 12 compared to 18 percent of white Democrats.

Q And how about the difference between white and black Republicans?

A Similarly large, about 46 percent. So –

Q Go ahead.

A So 60 percent of black Democrats were included in this district under the Rucho-Lewis map from these counties compared to 14 percent of white – I'm sorry, black Republicans compared to 14 percent of –

Q And then does Table 8 of your report show the same thing under the benchmark map?

A It does.

Q And can you explain how these two analyses compare?

A Again, it's the same data, it's the same people. The question is only whether the lines sorted them differently, and in this case, 40 percent of the white Democrats were included in CD 12 from these counties compared to 57 percent of the [314] black Democrats. That's a 17-point difference compared to a 47-point difference.

Looking at the Republicans, 20 percent of the white Republicans were included in the district compared to 52 percent or 53 percent of the black Republicans and so forth. Again, these differences show differences that the existing district did have some degree of sorting across racial lines, but that sorting increased because as you go back and compare, say, white Democrats versus black Democrats, the white Democrats dropped from 40 percent to 18 percent and the black Democrats increased from 57 percent to 65 percent.

The white Republicans decreased from 20 percent to 14 percent, the black Republicans increased from 53 percent included in the district to 60 percent included in the district. The white undeclareds decreased from 21 percent included in the district to 17 percent included in the district, and the black undeclareds increased from 50 percent included in the district to 60 percent included in the district. So the swapping of areas in and out, however it's done, VTDs, tracing along the segments, whatever they did, it had the effect of sorting along these racial lines.

Q Did you summarize the results of your analyses in these tables we've been looking at in a final table here?

A Yeah. Table 9 just draws together the analyses in Tables 5, 6, 7 and 8, so you can compare side by side

how the changes [315] occurred from the benchmark to the Rucho-Lewis map in CD 1 and CD 12 for each of the parties and groups and each of the racial groups within those.

Q Now, if these two congressional districts had been drawn without regard to the race of voters but instead to pack Democrats into the two districts in order to advantage Republicans elsewhere in the state, would you have expected the analysis to look like this?

A I would have expected the analysis to look different. I would have expected including more white Democrats. I would not have – sorting the white Democrats into the district. I would not – I was very surprised to see the high percentage of black Republicans and black undeclareds included in the district, and so those two figures in particular surprised me.

Q And are they consistent or inconsistent with an explanation that it was just politics here, we were just doing a political gerrymander to disadvantage Democrats?

A These are not consistent with a partisan gerrymander story, at least for these districts. I don't know anything about any of the other districts in the state.

Q Now, you also looked at the movement of VTDs into and out of these two congressional districts controlling for party, is that right?

A Correct, so I did a parallel analysis controlling for party to what I did for the inclusion and exclusion of Voting [316] Tabulation Districts.

Q This is sort of the other way around, one controlled for race, now you're controlling for party?

A Correct, and I did it both ways. One is I looked at party – race given party, that's Table 10, and party given race, that's Table 11.

Q Okay. Let's start with Table 10. Can you walk us through that table and tell us what we're looking at here.

A So as in Table 4, where I presented you with racial compositions of core of the district, the area moved in and the area moved out, I am, for each of the partisan groups, presenting the racial composition of the core in the areas moved in and out for CD 1 in the top panel and CD 12 in the bottom panel.

If we look at the Democrats, we see that the core, that is the areas kept in the district from the prior version of the map to the current version of the map, 70 percent of those voters, those registered voters, of those registered Democrats, were African-American. Of the areas moved in to the district, so the Democrats moved in, 66 percent were African-American compared to 29 percent white. And of the areas moved out, these are just Democrats, 49 percent of the population moved out were African-American, and 49 percent of the population moved out were white.

Now, the comparison to draw is between either the [317] core in the area moved out or the area moved in and the area moved out. So think about the area moved out versus the area moved in because you're swapping populations here. The core versus the area moved out is a 22 point difference. That is the black population, black registered population among Democrats is 22 points higher for the area that was kept in versus the area that was moved out.

Comparing the area moved in, first the area moved out, now you're swapping, it was 18 points higher. The

areas moved in had an 18 percentage point higher African-American concentration than the areas moved out, and that's among Democratic identifiers. Now, you can't get that answer any other way except by looking at registration data. You can't really look at election data and get down to that level of detail.

We see similar differences among Republicans, albeit smaller, and then among the undeclareds we see, again, similarly large differences, on the order of 20 percentage point differences between the areas informed in and the areas moved out and their African-American population.

Q So what's the pattern that you're seeing here in CD 1 when you control for party and look at race?

A Given party, there are big racial differences, very big racial differences in the areas moved in and the areas moved out, or the areas kept in and the areas moved out.

[318] Q And if the objection is no, no, no, we only did this for – this was a political gerrymander without regard to race, would you expect to see this?

A Possibly, but I'd want to turn it around and look at the effect of party, that is the differences between Democrats and Republicans percentages among racial groups to see if there were partisan differences given race. That would be more consistent with a partisan gerrymander.

This is probably not consistent with a party that's in gerrymander, but I really want to confirm it to see if there was any difference of party given race. This is race given party.

Q And what about CD 12, can you explain your analysis there.

A I did a similar analysis in CD – in Table 10 for CD 12, and I found, again focusing on the Democrats, that among the Democrats kept in the core of the district, 80 percent were black and 15 percent were white, and the areas moved out were 46 percent black and 49 percent white. So even among the Democrats, the areas getting moved out are much wider than the areas getting kept in.

Similarly, if I looked at the areas moved into the district versus the areas moved out, I find that 68 percent of the Democrats moved into the district are white versus 46 percent moved out. So those differences are 34 percentage point difference in the concentration of African-Americans [319] among the area kept in the core versus the area moved out than a 22 percent difference in the areas moved in versus the areas moved out.

That's, interestingly enough, larger by a case of the core versus the area moved out by 10 percentage points, and CD – our analysis for CD 1 among the Democrats. I looked at the Republicans and found similarly some noticeable differences there; and, again, differences in the area of 20 to 30 percentage points for the undeclareds.

Q So did party have any appreciable effect on the likelihood of being included in either of these congressional districts?

A So to analyze that, I turned the analysis around, and I found little or no partisan effect given what race you are.

Q And is your analysis of that question summarized in your report?

A That's summarized in Table 11.

Q Okay. Let's take a look at that. What's the difference between these two tables?

A The difference between these two tables is that rather than cluster the people for the registrations among Democrats, Republicans, and Independents, let's take a look at clustering by blacks and whites and then look at partisan differences. So among whites, are there appreciable differences in the Democratic percent moved in moved out, kept in moved out. And among blacks, are there appreciable differences in the [320] Democratic percentage of those kept in versus those moved out and those moved in versus those moved out.

Q Okay. Can you walk us through Table 11.

A So in Table 11, if I look just among – let's start with blacks. If I look just at the blacks, the percent Democratic among the blacks kept in the core of table of CD 1 was 89 percent versus those moved out of CD 1, and that was also 89 percent. So there's no difference between the core and the area moved out in the Democratic percentage among blacks. Similarly, if I look, there's no real difference between the areas moved into the district and the areas moved out, and the party registration among blacks.

If I look at whites, I see that 47 percent of the whites identify as Democrats and who are kept in the core of CD 1. Those moved into the district are 45 percent Democratic. In other words, they're moving in to the district in an area that's slightly less Democratic than the area they're keeping in and the area moved out is 41 percent Democratic. So the difference between the area kept in the core and the area moved out is 6 percentage points.

Compare that to 22 percentage points in the previous analysis for the percent Democrat given that

you're white. This is the percent – sorry, the percent white given that you're Democrat. This is the percent Democrat given that you're white. So there's very little difference in the areas [321] kept in versus kept – moved out by the areas moved in versus moved out and the percent Democrats among whites or the percent Democrat among blacks. That's given the race, there's very little partisan difference observed in the registration statistics for CD 1 and substantial racial difference given party for CD 1.

Q So what's that – what's your conclusion at the end of this analysis?

A For CD 1, my conclusion is that race was the predominant factor of a party in the configuration of CD 1.

Q Does the same analysis hold true with respect to CD 12?

A The exact same conclusions are drawn with respect to CD 12. Again, we've walked through this previously, but I found large differences in race given party for CD 12, even larger than for CD 1, and then when I turned to the analysis of partisan differences given your race, I find little or no difference again in your party alignment given your race or your party registration given your race. Between those –

Q So – I'm sorry, continue.

A Between those kept in the core and those moved out or between those moved into the districts and those moved out.

Q So if these two congressional districts had been drawn as partisan gerrymander without regard and not a racial gerrymander, would you expect to see this kind of a pattern?

A No.

[322] Q Now, what if the map drawer relied solely on the Obama presidential 2008 election data for the purposes of trying to draw a map to pack Democrats into these two districts? Did you examine that question?

A I did.

Q And what did you conclude?

A Well, I concluded several things. One is that the Obama vote was somewhat unusual compared to other partisan votes in the area. It correlated less strongly with the party registration than, say, the governor in '08 or US Senate elections. So if I was to pick a vote to capture partisans, that would have been the least good indicator, even in the 2008 election.

Q State-wide, how closely correlated was the black voting-age population and the Obama vote in 2008?

A I think it's .78 is the correlation.

Q Take a look at your reply report, that's Exhibit 18 on page 5. Is this where you talk about the correlation?

A This part talks about the correlation between black registration and black voting-age population and Obama vote rather than partisan registration.

Q I see. And what was the correlation there?

A The correlation between black registration and Obama vote is about .8, and the correlation between black voting-age population and Obama is about .6. So registration is strongly [323] related to voting behavior in this instance. It's especially strongly related to voting behavior of blacks in the area around CDs 1 and CD 12.

Q All right. And is this data reflected in a table in your reply report?

A It is.

Q And where is that? Is that Table 1?

A It is.

Q That is Exhibit 18, page 18, Table 1?

A Correct.

Q And this shows the correlation between black registration and the Obama vote?

A It does.

Q And the correlation is .8?

A State-wide, yeah.

Q Is there a typo in the body of your reply report somewhere?

A Oh, I think on page –

Q Page 6?

A Page 6, Table – paragraph 17, it's talking about black registration and it should – the very last line should say the correlation between black registration and black – and Obama vote is very high, not black voting-age population.

Q So that's paragraph 17, page 6 of Exhibit 18?

A Correct.

[324] Q But the correct data is reflected in the table that we just looked at on Table 1?

A Yes.

Q Okay. I just wanted to make sure we pointed that out to the Court so that there was no confusion on that. So let's focus on CD 1 and CD 12. How closely

correlated is black voting-age population or black voter registration and the Obama voted in those two congressional districts?

A In CD 1 black registration correlates .82 with the Obama vote and white registration negative .87.

Q Is that a high correlation?

A That's a very high correlation.

Q Does that indicate whether the Obama '08 vote is a strong indicator of the location of black registered voters in these two congressional districts?

A Yes. If I was trying to find black registered voters, that would be a pretty good indicator, if that was the goal.

Q And an extremely strong negative indicator of the location of white registered voters, is that right?

A Correct, and stronger than voting-age population.

Q Would use of the Obama '08 vote to draw these districts defeat or contradict your conclusion that race predominated?

A It would not – it would not contradict my conclusion.

Q Why not?

A Well, there are a few things. One is that the Obama vote [325] is so highly correlated with black registration that my analysis using black registration was totally consistent with the Obama vote. Also, the Obama election in '08 in particular was historic. It was the first black man running for major – from – as the nominee of a major party for President of the United States, and I think that that's an unusual election.

There's huge academic literature on this topic that goes into the different patterns of voting and how Obama changed it. So it would be an unusual election as a partisan indicator, and it was – it's a pretty substantial racial component, not a bad racial component just like there were people who wanted to vote for him just because it was the opportunity to vote for the first black man.

Q So you said a little earlier that you looked at the correlation between Democratic vote share of party registration and the Obama vote, the governor in 2008 and the United States Senate election in 2008. What was the correlation on those – of those three with respect to Democratic vote share?

A So do you want to direct me to something in the report specific or –

Q No. Do you have the numbers, the Democratic vote correlation with the Obama vote? I think you testified it was .78, is that right?

A Yeah, it's .78, and I think it's on page 11 of my report, paragraph 31. This is the response report, so it's Exhibit 18, [326] page 11.

Q Okay. And what was the – what was the correlation for the governor in 2008?

A It was .9.

Q And for the United States Senate?

A In 2008, .83.

Q So if you wanted to use election data for a partisan gerrymander, which of these three elections would have been the most useful?

A I think governor of 2008 would have been a stronger indicator.

Q And which would have been the least useful?

A Obama vote in '08.

Q So you mentioned a minute ago that the Obama election was unique. What effect would that have had here?

A On this case, it turns out that the correlation between black registration and Obama vote is actually a little stronger than the correlation between party registration and Obama vote. Normally party registration is very highly correlated with voting behavior. It's kind of a conclusion of literature. When we can use it, we use that as a good predicator of voting behavior.

It turns out that only half of the states have party registration in the United States so we can't use it to analyze all elections always, but in this case the black registered [327] voter – vote in '08 is even strong – more strongly correlated with the Obama vote share than the party registration.

Q And why might that be? I mean, would it have an effect on black Republicans, for example?

A You know, as I said, there were a lot of people who were excited about the opportunity to vote for a black person for the first time. Some of the research that's been done in this space has indicated that there were a lot of black Republicans, black undeclared voters crossing over and so forth.

Q And that might account for the lower correlation of Democratic vote share with the Obama vote?

A Certainly.

Q Okay. So let me just ask you a couple more questions and then I'll stop. If the map drawers had

been concerned about future population growth and drew CD 1 with an eye toward minimizing future population disparities between the different congressional districts, wouldn't that explain the shape in demographics of CD 1?

A So population growth might be a concern if you were – CD 1 was underpopulated by 97,000, and one might think, you know, we've got a growth problem in some part of this district so we want to put higher growing areas in to compensate. That's a possibility.

Q And did you look at that analysis?

A I did look at that.

[328] Q And where is that in your report?

A In my response report I looked in Section D at the question of whether the reconfiguration of CD 1, especially the inclusion of the parts of Durham could plausibly be explained from the data at hand as a function of population growth. Now, there's no population growth data in the General Assembly database, at least none that I saw, so instead I've looked at whether or not the racial composition of the portions of Durham County could explain why that part of Durham County was included.

Q And is your analysis summarized on Table 2?

A It is.

Q And can you walk us through that quickly.

A So Table 2 presents the population of voting-age population of registered voters in the city and county of Durham that were included in CD 1. Now, CD 1 didn't – under their benchmark map, didn't include Durham County. It reached over to grab Durham County and parts of Durham County. About, I think, 160,000 people from Durham County were included in

the reconfiguration, so that's a big change. That's about 20 percent of the population of the new CD 1 came from this reach of CD 1 over into Durham. So –

Q Go ahead.

A – of that, I think about 80 percent of that population is black. They weren't grabbing white areas. They were grabbing [329] black areas and grabbing the urban areas.

Q In Durham?

A In Durham.

Q All right. The General Assembly needed to draw the congressional map to achieve population equality. Doesn't that explain the shape of CD 12 in just equalizing one person, one vote?

A I didn't find population equalization to be a compelling explanation for what happened with CD 12.

Q How far off was CD 12 from the ideal population?

A CD 12 is only off by about 28 to 2900 people from the ideal population, so they just needed to move about 28 to 2900 people to get the ideal population.

Q And is that what the Rucho-Lewis map did, just move 28, 2900 people and called it good?

A So if I looked at areas moved in and areas moved out, so if we just took the areas like what we were doing with Voting Tabulation Districts, and I counted up the population of the Voting Tabulation Districts moved out and the Voting Tabulation moved in, it was about 240,000 people were moved out and 240,000 people were moved in, a hundred times more than was needed. That – those facts alone convinced

me that population equalization was not the primary motivation for reconfiguring CD 12.

Q All right. As a result of all of this analysis, Doctor, [330] you were able to come to a conclusion about whether race rather than politics predominated in the drawing of North Carolina's 1st and 12th Congressional Districts, is that right?

A I did.

Q And can you summarize your conclusion for us, please.

A My summary is that race predominated in the configuration of CDs 1 and CD 12 over a party, that the consideration of the envelope of counties and population of those counties in which those districts were located, and also the Voting Tabulation Districts moved in and out can be only explained by race and not party. The party, given race, had little or no effect on a decision to include which Voting Tabulation Dis – or the effect of the inclusion of the Voting Tabulation Districts.

MR. HAMILTON: Thank you, Doctor. No further questions.

JUDGE OSTEEN: Cross-examination?

MR. FARR: Yes, Your Honor. May I give the witness a map notebook that we've used previously and also put our maps up on easels.

JUDGE OSTEEN: You may. Are you going to use the monitor?

MR. FARR: Sir?

JUDGE OSTEEN: Are you going to be using the monitor?

MR. FARR: No, sir.

JUDGE OSTEEN: Mr. Speas and Mr. Hamilton, you all

* * *

[332] gerrymander claims?

A Racial gerrymander claims have come up in every one of those cases.

Q Okay. Do you know who's paying your fees in this case?

A The firm of Perkins Coie.

MR. FARR: May I approach the witness, Your Honor?

JUDGE OSTEEN: You may.

BY MR. FARR:

Q Dr. Ansolabehere, I'm going to hand you an exhibit marked Defendant's Exhibit 32. I'm going to ask you just to read the top part. It's an email from someone named William Stafford to Michael McKnight, a lawyer in my law firm. Just read that to yourself, and I'll have a question to ask you.

A How much of this do you want me to read?

Q I just want you to read this part right here.

A This, this –

Q Yeah.

A Okay.

MR. HAMILTON: Your Honor, I have no objection to asking him to read the question. I may have an objection to whatever the question is.

JUDGE OSTEEN: I didn't quite follow that.

MR. HAMILTON: I needed – I'm sorry –

JUDGE OSTEEN: No objection to the reading, and then we'll see what follows. You may go ahead and read that.

[333] BY MR. FARR:

Q So, Doctor, have you read this short paragraph?

A Yes.

Q Do you know what the Democratic National Voting Rights Trust Fund is?

A No.

Q You've never had any discussion with Mr. Hamilton or anyone in Perkins Coie about what that entity is? A Nope.

Q You didn't know that the source of the funds to pay your fees in this case were coming from the National Democratic Voting Rights Trust Fund?

A No, I just know it was coming – I was retained on behalf of the Harris plaintiffs by Dr. Hamilton's firm or Mr. Hamilton's firm.

Q And you've never met the Harris plaintiffs?

A No, I've not.

Q All right. Now, there's a number of things I want to ask you about that occurred during your testimony. You made a comment that dividing counties increases the costs or problems with election administration. Do you recall saying that?

A Yes.

Q Have you ever worked as an election official?

A No, I started and ran the Caltech-MIT Voting Technology Project which works on election administration issues. I [334] remain involved in that

project, and we work very closely with election administrators.

Currently I'm working with the Secretary of State of Rhode Island to help her manage better her election administration devices, her voter registration lists her precincting and so forth. So I've worked very closely with people such as Nellie Gorbea, who is the Secretary of State of Rhode Island to help them administer elections, but I've never worked as an election administrator.

Q So you've never worked as a precinct official?

A I have worked as a precinct official in my local neighborhood.

Q No, I mean in the precinct, running the elections in the precinct?

A Yeah, yeah, in my local neighborhood in Newton, Massachusetts.

Q You were appointed to be an actual precinct official?

A We – what we did is we actually made an arrangement as part of the Voting Technology Project to work election days as supplemental precinct workers so all the faculty, all the students who were working on the project volunteered to work in our cities, let us do that. We went through precinct training and so forth.

Q How long did you work in the precinct?

A I did two elections. I did a primary and a general.

[335] Q Okay. Were there any divided counties for legislative districts in the precinct that you were working?

A I don't know.

Q And you've never worked as like a county board elections director?

A No.

Q And you've never worked as a state Board of Elections official?

A No.

Q So you really have no knowledge whether – you have no personal knowledge about whether having a divided county makes election admin-istration more difficult?

A Only what election administrators report to us, the Voting Technology Project. We pretty regularly attend meetings like NASED and NASS and commonly hold election administration meetings. We've facilitated meetings of all the election administrators in the state of Massachusetts in the New England area. And also I've been involved in other activities such as the Presidential Commission on Election Administration run by Bob Bauer, a Democrat, and Ginsberg, a Republican. I organized a team of academic researchers to help inform them about their decisions, about how to run elections better, and that process interacted quite frankly with election administrators across the country.

Q Dr. Ansolabehere, could you – it would be helpful if [336] you'd answer the question that I asked you. I asked you, do you know what personal knowledge means if I say that?

A There are different forms of personal knowledge. You mean actually working the election?

Q Right.

A Just what I've described, but there's other forms of personal knowledge that include interacting with and listening to election administrators and the kinds of things that they tell us about the problems that they have and helping them to develop techniques and tools to help them manage elections better.

Q Have you conducted any academic study showing that administering elections is more difficult when a county is divided into different legislative districts?

A I've not done a study of it beyond interviews with election administrators.

Q Okay. And is there any sort of constitutional requirement in North Carolina that congressional districts be based upon whole counties?

A I'm trying to remember. I don't remember the North Carolina Constitution.

Q Okay. And isn't it true, Dr. Ansolabehere – or doctor I'll say, because I don't think I got it right that time. If we look at the two maps in front of you, Congressional Zero Deviation, that's the 2001 map, is it not?

[337] A I believe it is.

Q And then does it say Rucho-Lewis 3, that's the map enacted in 2011?

A It looks like it, yep.

Q And you can see those?

A Yeah.

Q And isn't it true that in – under the Congressional Zero Deviation map, Congressional District 12 was made up of six counties that were all divided?

A Correct.

Q And isn't it true there are some whole counties in the 2011 1st Congressional District?

A 2011, you mean Rucho-Lewis –

Q Yes.

A In the 1st Congressional District there are some whole counties in CD 1.

Q Okay. Now, when we took your deposition in this case, you told me that you were familiar with the *Cromartie* cases, right?

A Correct. I'm not a lawyer, but I've read them.

Q And you agree that the Supreme Court stated in *Cromartie* that actual election results were a better predicator of whether race was the predominant motive than registration statistics?

A I don't remember the exact wording.

Q If I showed you your testimony?

[338] A Sure.

MR. FARR: May I approach, Your Honor.

JUDGE OSTEEN: You may. And just as you move forward, you don't – neither side needs to ask if they can approach. We'll make you go back if we feel like you're abusing being up next to the witness. If you need to approach, just go ahead.

MR. FARR: Thank you, Your Honor.

BY MR. FARR:

Q Okay. Could you start on page 106 and read the question I asked you on page 106 at the top and then read your answer?

A Out loud or to myself?

Q Into the record, yes.

A So the question is on page 106: Okay. What is the – do you know what the Supreme Court of the United States says about election results or registration statistics are better predicter of actual voting conduct?

My recollection from this is what came up in *Cromartie*.

Uh-huh.

Answer, is that they said that the election in Breyer's opinion, is that right, was a – I'm trying to remember. I'm not sure I've got the right opinion in mind, but that election results are better predictors or preferred predictors. My experience analyzing the election – analyzing [339] data is that the two are highly correlated. Question –

Q That's all I need to ask you. So do you recall now that the Supreme Court said that election results were a better predicator of behavior than registration statistics?

A My recollection of that passage of – I think it's – I forget if it's *Cromartie* 1 or *Cromartie* 2, is that registration statistics need to show that the registration statistics are related to election data but election – because this is fundamentally about voting behavior.

Q Right. So they said that the actual election results were a better predicator of behavior than registration statistics?

A Again, I don't know the exact quote.

Q What –

A I don't know the exact line offhand.

Q Isn't that what you recalled in your deposition?

A My recall in the deposition is what I read, yep.

Q Okay. And yet in this case you didn't look at election results to analyze whether race was the predominant motive?

A I did. I looked at the relationship between the election results and the registration data to confirm that the registration data were indeed predicative of the voting behavior and – so there's a choice here about what kind of analysis to do. One choice is to do a conventional analysis where you look at the correlation between black voting-age [340] population at the Voting Tabulation District level and election results. That's the traditional thing that we as social scientists do or election analysts do in order to determine what's happening at the precinct level or at the district level.

The issue at hand is whether or not that traditional analysis, looking at the correlation between black voting-age population and election results, is stronger than looking at the correlation between registration data and election results. And the finding – and it was – it came out in my response report, the finding was that the registration data from North Carolina, especially around the area of CD 1 and CD 12, were much stronger predictors of voting behavior than were black voting-age population.

So that pointed me pretty strongly in the direction of using the registration data, and it's my professional experience that where the registration data are available, especially where race and party are available on the voter files, which is not very many states, that that's a preferable data source to use to analyze election behavior, projected election behavior

or future election behavior. The *Cromartie* decision was –

Q Doctor, could I ask the questions, Your Honor?

A Sure.

Q Dr. A, let me be more specific. You looked at the VTDs, [341] which you explained very well to the Court what a VTD is. You looked at VTDs moved in and out of Congressional Districts 1 and 12, and you examined the registration statistics, is that correct?

A Correct.

Q And you could have looked at the voting results for each VTD, could you not?

A Correct.

Q And you did not do that, did you?

A No, I did not do that.

Q And what's a better predicator of voting behaviors? The actual voting results for a VTD or doing a correlation analysis of registration statistics? What do you think would be a more precise way to decide how people in a VTD voted?

A If the question – I'm a little unclear of the question, but if the question is what's a better predicator of future voting behavior, then you could look at registration statistics and voting – past voting records, so if my prediction is about how this vote is going to come out in the 2014 congressional election, I could look at the 2008 Obama race or the 2008 governor's race. There's a variety of things to choose.

The reason I looked at the registration statistics is that they were showing up as more strongly correlated with the vote that was observed in the elections that

had occurred in the area than even were the voting-age population.

[342] Q Dr. A, isn't it true that the reason why you looked at registration statistics was because if you'd looked at actual voting results, you would have had to have concluded that District 12 was based upon political considerations, so you had to do something else to get around that?

A That's not true.

Q Okay. Now, let me ask you some other questions about your background. Have you ever been hired to draw a redistricting plan for a state legislature?

A Do you mean by a state legislature?

Q Yes.

A No state legislature has every hired me to draw a districting plan. However, I did draw the districting map for the *Romo* plaintiffs in *Romo v. Detzner*, which was – portions of that plan, especially CD 5, were recently adopted by the courts.

Q Okay. Well, my question was whether you had been hired by a legislature to draw a redistricting plan.

A Well, the complication is the legislature had to enact that map, so the legislature actually did enact some of the districts that we drew as part of that case.

Q Okay. But you've never been hired to draw a redistricting map for a legislature?

A By a legislature, no.

Q Okay. And have you ever been hired by a political party [343] or an entity to draw a redistricting map to submit to a legislature?

A Yes.

Q Was that in context of litigation?

A Yes, in the context of the Florida litigation.

Q Right. But other than in the context of litigation, have you ever drawn a redistricting map for a political party or a person to be submitted to a legislature during redistricting? A No.

Q Now, are you familiar with Maptitude?

A Yes, I am.

Q Could you briefly tell the Court what Maptitude is.

A Maptitude is a software package developed by a firm in Needham, Massachusetts. It's commonly used in redistricting. It's one of several software packages available. It takes the basic geographic information data that's provided by the Federal Government, merges it in with the census data, merges it in with past election data, and it is used pretty commonly to draw maps.

Q And do you know whether or not Maptitude was used to draw maps in North Carolina in 2011?

A I'm not sure, but I suspect it was.

Q Dr. A, you've been trained on Maptitude?

A Yes, I did a Maptitude training.

Q Okay. When you're drawing a map on Maptitude, can the map [344] drawer decide what information they're looking at?

A Yes.

Q And can you pull up election results based upon Vote Tabulation Districts?

A Yes, it depends on what they've loaded into the system. I don't know how the system was configured for North Carolina.

Q Okay. Now, would you not agree that when you're – if you're drawing a map based upon election results, you cannot tell the race of the voters?

A Of individual voters? Q Um-hum.

A The data are – the data in a district mapping system are at the level of blocks or VTDs. Blocks are small census areas, typically around 200 to 400 people that can be moved around, but they can be as small as 1 person, so in that case you could tell that one person's race if there was one black person in that bloc. But typically that's the lowest level of aggregation you get bloc level.

Q Okay. That wasn't my question. If you're looking at election results on a VTD level, can you determine what the race of the voters are in that VTD?

A The voters as a whole or an individual voter?

Q The voters in the VTD? Can you tell the race of any of the voters in the VTDs?

A Any individual voter? No, but the race of the voters [345] aggregated, if I'm in Maptitude looking at the VTD level data, I can click on a button and it will pull up a number that shows on Maptitude what the VTD race is.

Q That's if you pull the button up to look at the racial data, right?

A Again, it depends on how it's configured. I don't know anything about how the North Carolina – the process of drawing the districting map in North Carolina, who did it and what they – how they had configured the system.

Q So you don't know what they looked at when they drew the maps in North Carolina?

A Yeah, I don't know anything about the process of –

Q But you would agree that if you were using Maptitude, and you're looking only at election results for each VTD, that would not include racial data if you were only looking at election results?

A If you were only looking at racial data and you turned off everything else, then that would be the case.

JUDGE OSTEEN: Only looking at – all right. Slow down a little bit. He asked you about election results.

THE WITNESS: Right, oh, I'm sorry. Sorry. If you're only looking at election data, and you only pull up the election data, then that would be the case; but, again, I don't know how it's configured. When I took Maptitude training and what was explained to me by Maptitude is the default settings [346] are the racial data – are the census data. So anything census has provided is what's uploaded. So you'd have to turn that off and then turn on the election data.

BY MR. FARR:

Q Did you make any effort to determine what was on the screens when Dr. Hofeller was drawing the districts?

A No, I was not asked to look into the process of the map paper.

Q So you didn't – you didn't review any of the testimony in the state court case, *Dickson v. Rucho*?

A No, I did not.

Q You didn't review any of the affidavits or statements that Dr. Hofeller made?

A No, only his reply report to me in this case.

Q And you didn't look at any of the statements that the two cochairs, Senator Rucho and Representative Lewis, made about the criteria that they directed Dr. Hofeller to follow in drawing Congressional District 12?

A No, I did not.

Q Now, you've done two VTD comparisons, one involving registration statistics and the other involving race, is that right?

A Yes.

Q Okay. Now, did you – you talked about the *Bethune-Hill* case?

[347] A Yes.

Q Now, in this case you never looked at election results for the VTDs that were moved in and out of the 12th District or the 1st district?

A Correct.

Q In the *Bethune-Hill* case you did not do that?

A Correct, because they do not have race and party on the registration file so we can't look at the counterfactuals of party given race and race given party. We have to rely on the correlation between black voting-age population and election results. That's the best we could do, which is – I saw here was a weaker correlation than the registration correlation.

Q Okay. So in the *Bethune-Hill* case, you looked at election results, which the Supreme Court has said are better predictors of voting behavior than registration, but in the North Carolina case –

JUDGE OSTEEN: Let me – there's several levels to that question. You had an exchange about what the Supreme Court had said in the *Cromartie* case with respect to election results, so try to just ask a question instead of a comment in the middle. Do you follow what I'm saying?

MR. FARR: I'm sorry, Your Honor. I apologize.

JUDGE OSTEEN: No apology necessary.

MR. FARR: All right.

BY MR. FARR:

[348] Q So Dr. A, we went over your testimony that you were aware of the fact that the Supreme Court in *Cromartie* said that election results are better predictors of future behavior than registration statistics, right?

A Right, I read that passage.

Q Okay. And so in Virginia you looked at election results comparing the election results in the VTDs that were moved in and out?

A Correct.

Q And then you looked at the racial statistics of the VTDs that were moved in and out?

A Correct.

Q And you compared the election results for a VTD that was moved out versus the racial statistics that was moved out?

A Correct.

Q And you did the – you compared the election results for the VTD that was moved in, and you compared the racial percentages for the VTD that was moved in?

A Correct.

Q And you – then you calculated the difference?

A Correct. It's essentially like looking at the correlation between the vote and the racial composition of the VTDs moved in and out.

Q Right. And you didn't do that in this case?

A No, because, in my judgment, the registration data were so [349] strongly correlated with the election data, and they allowed me to get down to that level of analysis that I wanted to get down to, so the registration data were preferable.

Q Okay. Now, your correlation on registration and race, that came up in your second report? That correlation table?

A Yes, I presented it in my second report.

Q And your second report was dated May 6 of 2014?

A Correct, and that was in response to Dr. Hofeller's report.

Q Right. And your first report was dated December 12, 2013, and this is Plaintiff's Exhibit 12 or – I believe it's 12, Your Honor. So your first report was dated 12/23/13?

A Let me look at the date. Yes.

Q So the correlation that you made between registration and race, that wasn't done in your first report, was it?

A It was not presented in my first report.

Q And you only did that after you saw Dr. Hofeller's report criticizing your first report?

A No, I looked at correlations between the data first, and then I made a determination that there was sufficiently strong correlation that registration was a predicator. The concern was that there might have been a lot of white Democrats who were crossing over and voting Republican, and I didn't see tremendous evidence of that or unusual –

Q Now, wait a second, Dr. A. Your first report – you don't [350] give any explanation in your first report why you didn't use election results, do you?

A No, I don't think there's an explanation for that.

Q You don't say I used – I didn't use election results because I think there's a stronger correlation between race and politics? That's not in your first report?

A I don't believe it is.

Q And you didn't talk about that correlation analysis until after you had seen Dr. Hofeller's report criticizing your report for not using election results?

A I didn't present those until I – I did not include them in my first report, which would be the only other time to present them.

Q Okay. Now –

MR. FARR: May I approach, Your Honor?

JUDGE OSTEEN: You may.

MR. FARR: I'm sorry, Your Honor, that's a hard habit to break. I apologize for asking.

JUDGE OSTEEN: That's all right. I didn't even think about it.

BY MR. FARR:

Q So, Doctor, I've given you Defendant's Exhibit 128. Do you know what this is?

A It's an article by Rick Pildes and Dick Niemi in the Michigan Law Review.

[351] Q And this is the 92 Michigan Law Review 483, December, 1993, correct?

A Correct.

Q And is this law review article on the topic on compactness?

A This is an article I believe about compactness.

Q Is this recognized as an authoritative article on the issue?

A Yes. This is one of – one of the – one of many articles on the issue that people reference.

Q I have one main reason for giving this to you, Doctor. I want you to turn to page 30, and you actually may want to look at page 29. Now, on page 29 and 30, do these authors not give the – give compactness scores for the 1992 North Carolina Congressional Districts?

A I'm looking at 29. It looks like their table on 30 I believe that's North Carolina – yeah, it's their measure of compactness.

Q Okay. And so there's two measurements there. One is called dispersion, the other perimeter. Isn't dispersion the same as the Reock test?

A If my recollection of this article is correct, then they're using Reock for dispersion.

Q Okay. And so this is the 1992 plan, and what was the Reock score that the 1st District received?

[352] A .05 – I'm sorry .25, sir.

Q Okay. So that means that the – I think I recall you saying that the 2011 1st District has Reock score of .29?

A Yes, the Rucho-Lewis map, yes.

Q Okay. So using your standard, which I'll ask you about later, the 2011 1st District is substantially more compact than the 1st District under the '92 plan, is that right?

A Yeah, it looks to be more compact.

Q And under your test, it'd be substantially more compact?

A Yeah, I did not compute these numbers.

Q Okay.

A So it's a given.

Q And what's the Reock score for district 12 which was the district that was ruled to be illegal in the *Shaw* case?

A Under this table, the Reock is .05.

Q Okay. That's all I have on that.

Now, I want to turn your report to Exhibit 12, and I want to talk about your compactness testimony. First of all, I want to ask you to turn to page 4, paragraph 7. Are you there?

A Yes.

Q Do you see the sentence where you say, "I conclude that CDs 1 and 12 are substantially less compact under the Reock Lewis map than the 2001 to 2011 map?

A Correct.

Q What did you mean by "substantially less compact?"

[353] A CD 1 – the version of CD 1 from the benchmark to the Rucho-Lewis reduced the compactness from .39 using Reock to .29. It's a 10 point drop. And then similarly there's a drop from .12 to .07 in the Reock score of the CD 12.

Q So when you use the word "substantially," is that just your opinion, or is there some sort of standard for knowing when a drop in a Reock score is, quote, substantial?

A Well, so the situation in CD 1 and CD 12 are somewhat different. CD 12, under the benchmark, was already a pretty non-compact district. Compactness score of .11 is very low, and I used a general cutoff as a rule kind of – just a rule where things are relative to the original gerrymander.

The article by Niemi and Pildes talks about using different thresholds of .25, .15, and .1. So under that rule, CD 1 came in pretty much right where the original gerrymander was, and CD 12 was substantially below that. So the levels is the first thing to look at, and then the reduction. If something's already highly non-compact, it's hard to make it less compact without squeezing it a lot, and that's what happens. So the percent difference is a big difference in CD 12, so those two things. There's a bit – a 10 point shift is a big shift in Reock of CD 1.

Q According to who?

A According to me. According to my experience.

Q Okay. Is there any legal case that says that?

[354] A I know of no legal case. I'm just testifying as an expert. I don't know the law on this.

Q Okay. And have you stated in this case, in *Bethune-Hill*, that if the Reock score is above .2, then that would not be considered a non-compact district?

A Yeah, .2 – .19 remember is the Reock of the original gerrymander in the State Senate side and .29 – or 28 is the original gerrymander in the congressional district. So .2 is one of the thresholds that we commonly use. .25 again is Pildes as well as .15 Pildes and Niemi. So different thresholds in that neighborhood are used, so we really look for that neighborhood. There's no firm statistical test for what's non-compact or compact. .2 is one of the rules of thumb.

Q So wait a second. I'm confused. What are the two districts you're talking about where you get this .19 and .28?

A The original gerrymander as it was drawn, the thing that we call the gerrymander, it's named after Elbridge Gerry – Gerry, had a Reock score of .19.

Q What kind of district is that?

A One of them is a State Senate district, and one of them is US congressional district. The State Senate district had a .19 and the congressional had a .28.

Q And how do you know that?

A I calculated it.

Q Okay.

[355] A I have Jeff Lewis, who's a scholar at UCLA, has provided all of the mapping data for every congressional district in US history, and I calculated the compactness of every congressional district in US history, including the original gerrymander.

Q Okay. Now, was there any finding that these two districts that you recall were found to be uncompact? A Finding?

Q By a Court?

MR. HAMILTON: Objection, Your Honor. Now he's examining him on the law. He's not a lawyer. He's here as a statistical expert.

JUDGE OSTEEN: He's asking for – he may or may not know, but he's asking a question about his knowledge. I'll overrule. You can answer the – if you – I mean, you can answer the question.

THE WITNESS: I don't know.

BY MR. FARR:

Q Okay. You don't – has there ever been a finding by a Court that either .28 or .19 are insufficiently compact?

A Not to my knowledge. As an analyst I use it more as a red flag than as something I throw at a district because it's too low.

Q All right. And, Doctor, do you know – I asked you this at your deposition, I think, but did you go back and look to [356] see what the Reock score was for the 1997 1st Congressional District?

A I don't recall that. That's over a year.

Q Okay. Well, if – if I will tell you that the Reock score for the '97 Congressional District was .319, would you consider a Reock score change from .319 to .29 substantial?

A .319? No, as a percentage change, it's a small percentage change – relatively small percentage change.

Q Okay. I want to turn to your chart on compactness which is Table 1 on page 22 of Plaintiff's Exhibit 12. Are you there?

A Yes.

Q So I just want to point a few things out to the Court about your Reock comparison, Doctor. You're reporting a Reock score for the 2011 1st District of .294?

A Yes.

Q Okay. And the 2001 and 2011 plan, were there not several districts that had a lower Reock score than the 2011 1st Congressional District?

A Say that again. Were there any districts that had a lower –

Q Right.

A I think we're using the terms – 2011, you mean the Rucho – what I'm labeling the Rucho-Lewis column here?

Q Yeah, what –

[357] A Let's compare 2.294 to all of the numbers in the 2011 to – 2001 to 2011 map?

Q Yes, sir.

A So 294 is below all five in this analysis 12, CD 12, which is .16.

Q Yeah, and also 13?

A And 13 which is .237.

Q And the 2011 District 2 is pretty close to the 2011 1st Congressional District?

A You mean –

Q .303 is pretty close to .294?

A Okay.

Q That's not a substantial difference, is it?

A No.

Q All right. And then if we just look at the Rucho-Lewis map, are there not several districts in the 2011 congressional map that have a lower Reock score than the 1st District?

A There are. They are 4, 6, 9, 11 and 12, and with the exception of 11, all of them border 1 and 12.

Q Okay. Now, I have a question about – about one of the ones that is lower in the Reock score. It's Congressional District 9 in the 2011 map. Do you see that?

A I do.

Q And that's – that district is down in the Mecklenburg County area, is it not?

[358] A Correct.

Q Okay. Now, in your testimony you said that Congressional District 12 caused Congressional District 9 to be less compact. How do you know that Congressional – the configuration of Congressional District 9 didn't cause 12 to be less compact?

A It could have gone either way, but if I was just analyzing 12 and I'm putting a boundary of 12 in there to comply with, say, the Voting Rights Act, and I'm configuring it a certain way, then that would be taking – the movement of VTDs in and out would be causing less compactness.

And remember that Mecklenburg cut of nine underneath Charlotte, that sent a finger up. That adds to the non-compactness. So those kind of moves, those kind of VTD – those twisting VTD boundary twists

around the southern part of Charlotte are adding to the non-compactness. It doesn't contribute to the entire shape of the district because they're not twins in some sense.

Q But your – you agree with me that it's possible that what you described as the compactness of the 2011 12th District, it could be – it could have been caused by things the decision makers did to draw Congressional District 9?

A Correct.

Q And Dr. Ansolabehere, you didn't look at the political impact of any of the other congressional districts in the 2011 plan?

[359] A No, I was only asked to look at CD 1 and CD 12.

Q So you didn't look – you didn't compare, for example, the political balance in the congressional delegation in the 2001 map and how that compared to the political balance of the 2011 map?

A No, I did not.

Q And so you have no idea how political considerations that went into drawing other districts might have impacted the shape of Congressional District 12?

A I only looked and was only asked to look at CDs 1 and 12 and whether race or party were a more substantial factor in understanding the configuration of those districts.

Q Okay. So then perhaps you can answer my question. You have no idea how changing the political balance of the entire congressional map in 2011 may have impacted the shape and location of Congressional District 12?

A I didn't look at the entire political balance of the map so I can't answer that question.

Q Right. And that could have been a factor in the shape and the location of Congressional District 12 and the decision on what VTDs to put in Congressional District 12, how it impacted surrounding congressional districts?

A That is highly unlikely given the analysis of race versus party and party versus race. If you were moving partisans in and out, you would have seen a different pattern of the [360] movement of VTDs in and out. You would not have been moving racial groups given their party in; you would have been moving partisans groups given their race in.

And that was – that particular analysis, which is only really accessible through the registration data, indicates to me that at least the boundaries narrowly confined around these districts, not the entire area of the state, but it varies right around these districts, were more driven or had more of an effect of sorting by race and not by party.

Q Okay. You say that that just is implausible. Let me ask you this question, Doctor: Do you know who the incumbent Congressman was in Congressional District 8 after the 2010 election?

A I don't know.

Q Do you know if it was a Democrat?

A I don't recall.

Q Do you know which party's candidate won the election in Congressional District 8 in the 2012 election?

A I don't know. I have not –

Q Okay. Do you know which party's can – you see where Congressional District 13 is in the 2001 map?

A Yes.

Q Do you see how that stretches from Raleigh and goes across the northern top of the state and then reaches down into Guilford County?

[361] A I do.

Q And, by the way, did you ever – did you ever look at the 1997 congressional map?

A No.

Q So you couldn't – you wouldn't know whether or not the 13th Congressional District took heavily Democratic precincts out of the 1997 congressional map?

A I did not look at the '97 map.

Q Okay. Now, do you know who the incumbent was in the 2013 Congressional District in 2010?

A In the 13th District?

Q Yeah.

A No.

Q And do you know – can you see in the 2011 plan that Congressional District 13's no longer located in Guilford County?

A Correct.

Q And do you know who won the election, Republican or Democrat, in the 2012 general election for Congressional District 13?

A I don't know.

Q Okay. Do you know whether or not the percentage for the candidate running – the Democratic

candidate running in Congressional District 12 in 2012, do you know whether or not their vote total increased as compared to the prior [362] presidential election in 2008?

A So that the vote for Mel Watt in 12 for CD 12 in 2012 versus 2008?

Q Right, do you know if that increased?

A I think it must have increased because I think CD 12 – 2012 was his peek. I think that's 80 – he got 80 percent, so I think that is an increase. I don't know what the number is offhand.

Q Okay. So his percentage of his vote increased after CD 12 was redrawn by Dr. Hofeller, and according to his testimony drawn to make it a stronger Democratic district, is that correct, sir.

A His vote increased, yeah.

Q Yeah, okay. And did you look to see whether or not Congressman Butterfield's vote in the 2012 district and his margin of victory increased as compared to the 2008 general presidential election?

A I'm trying to remember what the '08 was in 2000 – I know it's behind me on the board, but I believe it increased.

Q Okay. Did you ever study Congressional District 2?

A No, I did not study Congressional District 2.

Q Right. Did you ever study the percentage by which – there was a Republican candidate that won that district in 2010. Did you look to see whether or not that candidate won that district by a larger margin in 2012 as compared to 2010?

[363] A No, I did not study 2002.

Q Okay.

A The CD 2.

Q All right. So you didn't make any political analysis of any of the districts and how they were impacted by the changes that were made in the 2011 map?

A No, my analysis only considered CD 1 and CD 12 and whether or not the configuration was better predicted as a function of race or of party.

Q Okay. And now I'm going to ask you a question I should have asked you in your deposition. I want to look at your compactness table on page 1.

A Yes.

Q And that's called ratio of area to perimeter of district?

A Yes.

Q Can you tell me – you don't have any calculations with this report showing how you calculated these numbers, do you? A No.

Q Okay. Can you tell me how you got these numbers?

A I used ArcGIS which is the base – so ArcGIS is the standard GIS platform. So Maptitude is actually programmed on top of ArcGIS to use the geographic information system that ArcGIS has, and the programming just pulls up the information from ArcGIS and puts a nice interface on it so it can go around. So I was working in ArcGIS and I overlaid the – I [364] calculated an ArcGIS because it has the function, the perimeters of – in miles of the area of the districts and the areas in square miles.

Q Okay. So you calculated the perimeter of the district, which is the – if you walked all the way around the district, that's the perimeter?

A Correct.

Q And then you calculated the square miles that were inside of the district?

A Correct.

Q And then – and then what did you do?

A It's just the ratio.

Q This is the ratio?

A I calculated the ratio of those two things, the area to the perimeter.

Q Okay. So explain to me – explain to me what – let's just look at Congressional District 1 for the 2001, 2011 plan. The ratio of the area to the perimeter is 11,098?

A Yes.

Q So that means that for what? What does that mean?

A For every unit of area, there is – for every 11,000 square miles contained in that, right, so that's – every mile gives you 11,000 square miles, so that's the ratio.

Q Okay. So you're saying that 11,098 is the number of square miles in Congressional District 1?

[365] A No, no, so this is the ratio of the area to the perimeter. You take that ratio.

Q Okay.

A Total area divided by the perimeter.

Q So you take the perimeter, divide by square miles, and you're saying you get 11,000 – or excuse me – 11,098 would be the ratio?

A I believe that's the ratio we calculated, yes.

Q So can you back engineer that and tell me what the perimeter of the –

A I'd need to know some other – I'd have to have the data with me to back engineer and tell you what the perimeter is.

Q Okay.

A The key thing is the ratio of those two numbers from the Rucho-Lewis map to the – from the benchmark to the Rucho-Lewis is about .6 which means there's a 40 percent reduction in the compactness using area to perimeter.

Q Okay. Do you know how many square miles there are in North Carolina?

A No, not offhand. And I don't remember if this was square miles or some other measure of area.

Q Okay. Here's what I don't understand. I'm going to – we'll put this into evidence later, but I think Dr. Hofeller will testify there's around 53,000 square miles in North Carolina. I think he also will testify if you look at the – [366] under ratio of area to perimeter of districts, these numbers that you've got in there, for like the 1st District you've got 6,896 and then so forth. If you add all that up, Doctor, we've got 123,000.

A Okay.

Q So how could you get 123,000 as the ratio between the perimeter in square miles when there's only 53,000 square miles in North Carolina?

A Well, I don't know what the math is that you've done. I can go back and reconstruct this using my code for ArcGIS. It's a little unusual to ask me about this in the context of a court of law where I can't go back and look at my data.

Q Well, if you had your data here and you had your calculations with your report we'd be able to look at it?

A If I had ArcGIS. This is what ArcGIS provides if you go in and ask for the ratio of square miles to the perimeter.

Q But you don't have your actual figures showing what you divided to arrive at the figures that are in this table?

A No, it's in a computer program.

Q Okay. Now, this second test we just looked at, is this a recognized test for compactness?

A This is one of many indicators area to – ratio of areas to perimeter. There's similar kinds of tests. I think Schwartzberg is also a perimeter type test, so there are different kinds of perimeter tests one can use; and this, [367] again, is measuring how jagged the perimeter is relative to the area.

Q Is there a name for this test?

A This one is literally called the area to perimeter test. It's a fairly old one.

Q Okay. I thought in your deposition you told me this test did not have a name?

A Well, when it shows up on the – when you get – ask for some number, you can ask for the area to perimeter ratio. That's what it comes out as in the computer program. So it doesn't have a name like Schwartzberg or Reock or Polsby-Popper. It's not

tagged to some academic who published it in a particular article. It's just produced as a matter – a common sense matter in computer programs that calculate GIS.

Q I guess a couple more questions about that that I forgot. Just looking at your table on page 22, explain to me – this is your ratio of area to perimeter test. Is it more compact if the number's higher or lower?

A Higher number is more compact. That is there's more area for each piece of perimeter.

Q Okay. So under your test, this – what you describe as ratio to area is perimeter, the Rucho-Lewis Congressional District 1 is more compact than at least three of the districts in the 2001 Congressional Plan, is that right?

A So reading down the Rucho-Lewis, we have 6896 as the ratio [368] for Rucho-Lewis, for CD 1; 3265 is the ratio for CD 4; 3669 is the ratio for CD 9; 1839 is the ratio for CD 12; and 5377 is the ratio for CD 13.

Q So those are the districts in the 2011 plan that are less compact under this test than the Rucho-Lewis 1st District?

A Right, so they're less compact, and my comparison is from the benchmark to Rucho-Lewis.

Q Okay. I got confused on that, Doctor. If you compare the 1st District in the 2011 plan under your test to the 2001 plan, are there not at least three districts that are less compact than the 2001 plan?

A Than CD –

Q CD 1 in the 2011 plan?

A So, in other words, using 6896 as the benchmark?

Q Yes.

A I see CD 9, CD 12, and CD 13 as having less area to perimeter than 6896.

Q Okay. And then there's at least four districts in the 2011 plan that are less compact than Congressional District 1 in the 2011 plan?

A Say that again because we're comparing across.

Q I'm sorry. Just looking at the 2011 plan under your ratio of area to perimeter test, are there not one, two, three – aren't there four districts in the 2011 plan that are less compact under this standard than in Congressional District 1?

[369] A Guide me through it. I'm not sure the com – I'm unclear of the comparison you're drawing. Are you comparing the 11098 number to –

Q No, no, I'm sorry. I'm looking at Congressional District 1 in the Rucho-Lewis plan.

A Okay.

Q Six-nine – 6896, right?

A Got it.

Q So that's more compact than Congressional District 4?

A Correct.

Q It's more compact than Congressional District 9?

A Correct.

Q It's more compact than Congressional District 12?

A Correct.

Q It's more compact than Congressional District 13?

A Correct.

Q Okay. Now, you have – you have admitted that you've not studied the partisan impact of the first – of the 2011 Congressional Plan?

A No, I've not.

Q So you haven't – you have not drawn a map in this case, you've not drawn an alternative Congressional Plan, have you?

A No, I have not.

Q And you've not drawn an alternative Congressional Plan to show how districts could have lower Reock scores while still [370] achieving the same partisan balance that the General Assembly desired to achieve in the 2011 Congressional Plan?

A No, I have not.

Q Question, you stated that the Reock score of District 11, which is the westernmost district in the state, you said that that was impacted by the fact that that was the boundary of the state?

A Correct.

Q Okay. Now, Congressional District 1 goes to the northern boundary of the state?

A Correct.

Q Why doesn't that impact the Reock score of Congressional District 1?

A A couple of reasons. One is 11 is almost completely defined by the boundary of the state, so 11 is probably – in the zero deviation map shown here, that's probably, I don't know, 80 percent of the

boundary of the district is the boundary of the state. And it's very – it's that narrow tail of the state, and however non-compact that is, it's going to affect the compactness score. Also, it's defined by the boundary of the state squiggling in and out up there, and that's going to affect it as well.

The boundary of CD 1 is that northern part is a much smaller segment of the whole boundary, and it's also very smooth, so the compactness is affected both by the smoothness [371] of the boundary and the extent of it. So it's a smaller extent of the state's boundary and it's a less squiggly part of it, so it's got – those are the two features of the state boundary that are going to affect the compactness score for CD 11.

Q Okay. So the state boundary has a bigger impact on the Reock score for Congressional District 11. Does it not have some impact on Congressional District 1?

A It could.

Q Okay. And you didn't mention that in your report, did you?

A No, just eyeballing the shape of the district, what's going to have a much bigger effect on the Reock score for Congressional District 1, this long tail hanging down, because that's going to affect the distance, the diameter of that circle more than the distance.

Q All right. Doctor, I want to move on to page 8 of your first report which is exhibit – Plaintiff's Exhibit 12. I've got a few questions about your testimony about race.

Your Honor, I've been making a mistake. I think this is Plaintiff's Exhibit 17.

JUDGE OSTEEN: What you've been calling 8?

MR. FARR: No, the first report is Plaintiff's Exhibit 17. I've been calling it 12, I think.

JUDGE OSTEEN: Okay. I'll make a note for the record.

[372] MR. FARR: I apologize.

JUDGE OSTEEN: That's all right.

BY MR. FARR:

Q Doctor, when you looked at the racial characteristics of Congressional District 1 and 12, did you attempt to determine the non-Hispanic white population for those districts?

A No.

Q And when you – in paragraph 18 when you're talking about the black voting-age population?

A Yes.

Q You've been here during trial, I think.

A For much of it, not all of it.

Q Okay. I think you actually explained this in your testimony, but there's a difference between single-race black voting-age population and any part black voting-age population, correct?

A Correct.

Q And I think – did you explain that to the Court? I won't ask you to do it, but I think you did.

A I did.

Q Okay. Now, right here in paragraph 18, which one of those categories are you using? When you say – when you say "black VAP," is that single-race, or is that any part black?

A It should be any part black.

Q Okay. And then I wanted to note that as of the time of [373] the 2000 Census, you are reporting here that the registered voters in the 1st Congressional District were 50.7 percent black?

A Correct.

Q So they were a majority – blacks were a majority of the registered voters in the 1st Congressional District?

A Correct.

Q Did you try to determine what percentage the black voters were of registered Democrats?

A No, I did not.

Q Did you attempt to look at the percentage of Democrats that were in this district?

A No, I did not.

Q Either for the 2001 Plan or the 2011 Plan?

A Nope.

Q Okay. And then look at your paragraph 18. In the last sentence where you reference Congressional District 1 – and this is Congressional District 1 under the 2001 Plan where the blacks were a majority of the registered voters, correct?

A Correct.

Q Okay. Then you've got a figure there that says 48.6 percent, and I'm not quite sure. Does that mean that blacks were 48.6 percent of the registered voters in Congressional District 12?

A That's my reading of the sentence.

[374] Q Okay. And did you report the white registration statistics?

A I did not.

Q And do you know whether whites were a minority of the registered voters in both of these districts under the 2011 Plan?

A I don't know. In the case where blacks are 50.7, they have to be because blacks are the majority.

Q Okay. And then do you know whether – in the North Carolina statistics on registration, are Hispanics in a separate category, or are they included in either the white or black category?

A My understanding of the registration data are that you identify as white, black, Hispanic, Asian, et cetera, so you choose a category.

Q Okay. Now, I want to talk about – now, I want to move to your envelope theory if we could talk about that for a little bit. Who came up with the idea of using the envelope theory in a racial gerrymander case?

A What do you mean?

Q Who first used that? Did you borrow that from someone else, or is that something that you –

A I was relying on the traditional districting principle that you want to keep – you look at where the counties are located, so you're keeping – thinking – imagining counties [375] being kept whole or the counties being the locus of the districts. That's an old idea. That's in state laws going way back, and my book on the history of the one person, one vote cases tells that story of the importance of counties. So I looked at the location of the counties in which those – that those districts were positioned.

Q Okay. But my question was, who's the first person to ever use that theory in a redistricting case alleging racial gerrymander?

A I don't know what you're referring to as a theory. This isn't – you mean the idea that counties are the basis for redistricting? That's old. I think it comes from England –

Q Well, I think my question is more straightforward, Doctor. Have you or anyone else who has ever testified in a racial gerrymander case and used your envelope theory to try to prove that race was a predominant motive?

A The envelope isn't a theory. It's just a definition of the location of the district. It says the district is located in the – maybe we're using the word "theory" differently – but the district is located in this area of the state. Let's use the county as the definition as a kind of wide-area definition. There are other scholars – other experts who have talked about – have used counties – we use counties all the time when doing racially polarized voting analyses and so forth. So counties are a pretty widely accepted basis for [376] analyzing elections and election performance.

Q Let me ask my question again. Do you know of anyone who's given testimony in a case where they have attempted to prove racially – a racially gerrymandered district using your explanation of the envelope?

A I used it in Virginia. I don't know what – I haven't studied other reports in other cases.

Q Has it ever been acknowledged by a court?

A Well, the Virginia - Virginia has not decided yet, but we entered evidence about like the location of House districts inside counties.

Q Okay. Now, has there ever been a peer-reviewed law review article about this envelope concept – since you don't like me to use the word "theory" – the envelope concept? Has anyone written a peer-reviewed law article on that?

A I don't know.

Q You're not aware of –

A I'm not aware of that.

Q In what case did you use the envelope theory in in Virginia? Was that the *Bethune-Hill* case?

A *Bethune-Hill* we used – I used in Table 12 of my report, the calculation of the location of the counties within the set of – the districts within the set of counties and the populations that are in and out of those and the VTDs moved in and out.

[377] Q Okay. Was it – I've got both reports here, Doctor. Do you know was it your first report –

A I don't recall which one.

Q Well, I'll bring both of them up to you. We'll see if we can find that.

MR. FARR: I made a mistake, Your Honor. I apologize. If I could just have it all back. Your Honor, would this be a good time to take a break so I can get this sorted out over lunchtime?

JUDGE OSTEEN: Do you genuinely think pulling your exhibits together and being ready to move will speed things along?

MR. FARR: Sure.

JUDGE OSTEEN: All right. Let's take – we'll stand in lunch recess for an hour and resume at 1:15.

(At 12:11 p.m., break taken.)

(At 1:27 p.m., break concluded.)

JUDGE OSTEEN: All right. Mr. Farr, you may continue your cross-examination.

MR. FARR: Thank you very much, Your Honor.

BY MR. FARR:

Q Doctor, I wanted to ask you just a couple of questions about compactness to wrap that subject up.

A Okay.

Q Do you believe this compactness – would a compactness [378] score above – on Reock above .2, would you agree that that's not considered a low score if it's above a .2?

A Correct.

Q That was easy.

Okay. Now, I want to talk to you about the part of your report which begins on page 7, I think, or maybe page 6 about how many cities and counties CD 1 and CD 12 split.

A Which report are we looking at?

Q It's your first report, which is actually Exhibit 17?

A Yes.

Q And I wanted to ask you in preparing this report, are you aware of the concept of satellite annexation? Do you know what that means?

A I don't know what that is.

Q So since you don't know what it means, you didn't take into account the satellite annexation in evaluating how many cities had been divided into different congressional districts? A No.

Q Okay. And for Congressional District 1, did you – did you study the amount of population that was in some of the cities that were divided?

A In reference to – which part of the report are you looking at?

Q Well, you talked – in CD 1, you said that there were – in the 2011 version of Congressional District 1, you stated [379] there were 22 divided cities and towns.

A Correct.

Q And my question is did you – did you look at the portions of the cities that were divided to determine how many people lived in the portions that were divided?

A No, I did not.

Q All right. And then you've testified that Congressional District 12 in the 2011 version divides 13 cities or towns?

A Yes.

Q Did you analyze how many cities or towns the 2001 version divided?

A I believe it was the same.

Q Oh, you think it was the same?

A I think it was.

Q It's not –

A It's not shown here.

Q Okay. You don't have that in your report?

A Right.

Q All right. Now, Doctor, would you agree there's a very high correlation between African-Americans

and the number of them who vote for Democratic candidates?

A The percentage of African-Americans who vote for Democratic candidates tend to be in the 90 percent range.

Q Okay. And that's much higher than the percentage of whites who vote for Democratic candidates, is it not?

[380] A Depends on the area. There's some areas of the United States that – where that's equally high; but in my analyses of North Carolina, typically it's much lower than that among the white population.

Q So your understanding is North Carolina whites vote for Democratic candidates at a much lower rate than blacks vote for Democratic candidates?

A Correct, on average throughout the state.

Q All right. Thank you. Now, I want you to turn to page 9 of your first report. Okay. And this is where you described the two different tests you performed using registration statistics that emulate concept and looking at the VTDs that were moved in and out, is that right?

A Correct.

Q Now, in paragraph 20, the last sentence says, "If the lines were drawn without respect to race, one would expect the white and black registered voters would have approximately the same likelihood of inclusion in a given Congressional District." Do you see that?

A Correct.

Q And that's a statement you made in reference to your envelope concept?

A Correct.

Q All right. Doesn't that assume that whites and blacks are voting for Democrats at the same percentage?

[381] A No. If there's a difference, then that would push me to dig deeper, which is why we look at the party given race question and then the race given party.

Q Okay. But you've admitted that blacks vote for Democrats at a much higher rate than whites vote for Democrats in North Carolina, is that right?

A That's what I testified, yes.

Q Okay. So even though you say that blacks voted a higher rate for Democrats than whites, you would still expect that if lines were drawn without respect to race, one would expect the white and the black registered voters would have the same likelihood of inclusion? Do you still stand by that?

A Yes.

Q Okay. And then let's look at your 21 where you're talking about your analysis of Voting Tabulation Districts. You looked at the ones that were moved into 12 and ones that were moved out, correct?

A Correct.

Q In 21 you say, "If changes in district lines are unrelated to race, we expect the composition of the VTDs moved into a district to be similar to the composition of the VTDs moved out of a district on average." Do you see that?

A Correct.

Q Doesn't that assume the blacks and whites are voting for Democrats at the same percentage?

[382] A No. As with the previous analysis, it would be an expectation, and then the question if there is a difference is to dig deeper and to determine whether there is a difference between the incidents with which blacks are moved in given their party versus the incidence with which Democrats are moved in given their race, for example.

Q Okay. But you don't think, Doctor, that if the goal of the legislature is to draw District 12 to be a stronger Democratic district, you don't think the result would be that there would be more black voters in District 12 in 2011 than there were in 2001?

A So these tests described here just state what the expectation would be under that supposition. Then if that supposition – if the expectation holds true, then I would dig deeper. Had it turned out that whites and blacks in these areas were moved into and out of these districts at the same rate, then I would have stopped the investigation and said it doesn't look like there's any racial effect here. But that test, since it failed, led me to dig deeper. So that's – that's the process that I followed in analyzing the data.

Q So even though you agree that blacks vote at a higher rate for a Democratic candidate, you're saying that there's an equal likelihood that a white person would be moved into District 12 if the intent of the map drawer was to make the district a stronger Democratic district?

[383]A The test is to see if there's a difference and, if there's a difference, to move to the next test.

Q Okay. I want to look at Table 2 on page 23 of your report, Exhibit 17. Are you there?

A Yes, I am.

Q And what was the purpose of this table?

A The purpose of this table is to describe the racial composition of the districts.

Q Of which district?

A Well, it presents the data for all the districts, but my focus was on CD 1 and CD 12.

Q Okay. And is this for the 2011 Plan?

A Yes, the Rucho-Lewis map.

Q And you didn't do one of these charts for the 2001 Plan?

A No.

Q All right. And the black category you're using here is any part black not Native American?

A Correct.

Q So that would be the AP black that we've talked about before?

A Correct.

Q And the white is single-race white non-Hispanic?

A Correct.

Q And that would be individuals who are white but not Hispanic?

[384] A Correct.

Q Okay. Now, let's turn to Table 3, and this is your envelope concept for the 1st and 12th District, is that correct?

A Yes. This is the analysis of the populations moved into the CD 1 and CD 12 in the envelope of counties that surround those districts.

Q All right. So like when it came to divided counties and divided cities, you compared the 2001

Congressional District to the 2011 Congressional District, correct?

A You mean in doing this analysis?

Q Yes.

A Yes.

Q Okay. You didn't do an envelope analysis of the 2001 districts?

A I do later.

Q Okay.

A When we divide it finally into race and party.

Q Did you do an envelope analysis of any of the alternative proposed congressional plans in 2011?

A No, I only analyzed the Rucho-Lewis map and the 2001 to 2011 baseline map.

Q Okay. Now, Doctor, if you were drawing a majority-black district in Northeastern North Carolina, do you know of any way to do that district without having a very high percentage of [385] the individuals in the envelope being African-American?

A I've never tried to draw a map for North Carolina. I've not been asked, so I don't know what the difficulty or ease of doing that would be.

Q Okay. Would you expect – did you know that Eastern North Carolina is one of the lower population areas in the state?

A Yes, based on county population statistics.

Q Okay. Wouldn't it be likely or wouldn't you expect if you drew a majority-black district in Eastern North Carolina that a very high percentage of the individuals in the envelope who were put in the majority-black district would be black?

A I don't know. I haven't tried to draw a map there.

Q So you haven't tried – you haven't analyzed how the 2011 map was drawn as compared to the way it could be drawn without having 71 percent of the black residents in the envelope ending up in the majority-white district?

A The question, as I understand it, asks me a counterfactual which is how could I conceivably come up with a map, and I haven't tried, so I don't know how to answer the question.

Q Okay. So you haven't really compared the 2011 1st District against other possibilities for drawing that district?

A No, I have not.

Q All right. I want to ask you about Table 4, and could you again explain what this is?

A This is the analysis of Voting Tabulation Districts that [386] were kept in the core of these districts, Voting Tabulation Districts that were moved in and Voting Tabulation Districts that were moved out, and racial composition is measured by the registration statistics.

Q Okay. Now, you've used the term "racial sorting."

A Yes.

Q Who came up with that term? Was that yours, or did someone else come up with that term?

A It's a common term to sort people into bins to move them into blocks.

Q Okay. Has that been adopted by a court as far as you know, the term "racial sorting"?

A I don't know.

Q So in this analysis, you state that the core of CD 1 – that's the part that was in both the 2011 district and the 2001 district?

A Correct.

Q And that was 56.4 percent black?

A Correct.

Q Would that indicate racial sorting to you, as you used the term?

A The question is when you approach – when the person who drew the map approached the district, perhaps they were looking at – you know, this is a hypothetical. Maybe they were looking at race. They have a decision to make about which [387] areas to keep in the district, which areas to move out, and which areas to move in, and whatever guided their decision-making had the effect of choosing areas that were kept in that had very high black concentrations.

Q But you didn't go back and look to see how this was done in 2011. You didn't compare, say, for example, the '97 1st District to the 2011 1st District?

A No, I did not study the '97 version of the district.

Q And the 1st District was underpopulated by 97,500 people?

A That's my understanding.

Q And it was the most underpopulated of the congressional districts in North Carolina in 2011?

A I don't know if it was the most underpopulated. I do know that it was underpopulated by that amount.

Q Okay. Now, you've testified – or your chart, I believe, says that the any part black voting-age

population for the 1st Congressional District under the – under the 2010 Census was over 48 percent, something like that?

A You're referring to Table 2, I think?

Q Yeah, I –

A Somewhere in that neighborhood – yes, somewhere in that neighborhood.

Q Do you think in order to add 75,000 people to that district and keep the percentage at 48 percent, would the map drawer have to have looked for black voters to put in that [388] district to keep it at 48 percent?

A I don't know. Again, that seems to be asking counterfactual about how the configuration of all the areas near – around it and what would be done could look like. So the counterfactual would be could I have drawn a map that would – had good properties and could – followed traditional districting properties and, you know, include – I don't know if I could have just grabbed all of Eastern North Carolina and made such a map.

Q But you haven't attempted to do that?

A I have not.

Q Were you here when Congressman Butterfield testified yesterday?

A Yes, I was.

Q And did you hear him say that he thought that the district should be kept at at least 47 percent black?

A I recall there was a discussion about that. I don't remember the exact number.

Q Okay. So in order to keep the district at 47 percent black if they – if that had been the goal of the

map drawer, they would have had – the map drawer would had to have made sure that at least 47 percent of the 75,000 – or 95,000 added to the district were black?

A Well, keep in mind that the racial composition depends on who's moved in and who's moved out, and its precepts can be [389] quite complicated about like what areas you're moving in and out. To keep it at 47 percent, some additional black population would have to come in, but I don't know how easy or hard that would be to do.

Q Now, in the Bethune-Hill case, you looked at the election results for the VTDs that were moved out of the various districts versus the ones that were moved in, correct?

A Correct.

Q And you didn't do that in this case?

A What do you mean?

Q You didn't look at the election results for any elections for VTDs moved in or out of the 1st or 12th District?

A No.

Q Now, do you think that as a result of the – let's look at District 12, for example. Do you agree that John McCain probably did better in the VTDs that were moved into District 12 than the ones who were moved out?

A I have no idea.

Q Did you say in your deposition that you expected that would be so?

A I expected it to be so, but I don't know if that was true.

Q Okay. And would you expect or predict, as you said in your deposition, that McCain probably did worse in the districts that were moved into District 12?

A That would be my expectation.

[390] Q Now, you have nothing in your report about how McCain did in the VTDs that were moved in or out of these districts, but did you not look at that before you prepared your report? A Nope.

Q You didn't tell me in your deposition you looked at how McCain had done in the VTDs?

A I don't recall. I mean, I – I'm sure I did some analyses back when I started analyzing this case, but.

Q Okay. Could you turn to page 114 of your deposition. What we're going to do at this time so that the court reporter gets it is I'm going to read the question, and I'm going to have you read the answer. Is that okay, Doctor?

A Certainly.

Q All right. I'm on page 114, line 12. I asked you this question:

"Okay. So, well, do you have an opinion if we just looked at the VTDs that were moved out of Congressional District 12 versus the ones who were moved in, would you have an opinion on whether the ones that were moved out had a higher percentage of vote for McCain than the districts that were moved into District 12?"

And what was your answer?

A "That would be my prediction."

Q On line 29, what did you say?

A Sorry – I'm sorry, I'm on page 115.

[391] Q On page 114, line 20.

A "No, not offhand, no."

Q And then I said: "You didn't look at that?" And then what was your answer?

A "I think I did look at it, but it's not in the reports."

Q So you did look at how McCain did in the VTDs that were moved in and out of District 12, but you didn't include it in your report?

A Well, I looked at the relationship of the Obama vote and the registration data and made a decision about – including the registration data.

Q Yes, but, Doctor, that's not my question. My question was I had asked you in your deposition did you look at how McCain did when the VTDs moved in and out, and you said that you did, is that right?

A My understanding, recalling this part of the deposition, was I looked at the relationship between the '08 data and the registration data, and I presented you with registration data, and I don't recall actually doing the analog of Table 4 for McCain/Obama. I might have, but I don't recall it.

Q Well, your deposition speaks for itself, sir. We'll move on.

I want to turn to your maps that you have in your first report, which is Exhibit 17. Now, I just have a few questions about these maps, Dr. A. You don't have a chart [392] there showing what the black percentage is based upon the shading that you have in these maps, do you?

A No, the footnote –

Q So we don't know what the different shades mean as far as what the percentage of the black concentration is because it's not explained in your report?

A Yeah, my recollection is these are deciles.

Q Your recollection is what?

A That these used the deciles. I did the maps several ways. I did them as – divided them into 25th percentiles and so forth. I did the map several ways.

Q Okay. But you didn't have a ledger in here so we could tell what these shades mean, right?

A Right. They're just – they're relatively higher. African-American concentrations are relatively lower.

Q Okay. But we don't know what the difference is between the different shades?

A I could look it up.

Q But in looking at this exhibit, we can't tell?

A I don't remember what the exact numbers are.

Q And this exhibit doesn't explain it?

A No.

Q Now, you also – this is a comparison of the 2001 Congressional Districts 1 and 2 versus 2011 Congressional Districts 1 and 2. Did you make this comparison for any of the [393] alternative 2011 proposals?

A No, I did not.

Q So there was a proposal offered by the Democratic leadership called Fair and Legal. You didn't analyze how it compared to the 2001 Plan as far as the black population that was added?

A No, I did not.

Q And there was a plan proposed by the NAACP, and you didn't look at that one either, did you?

A No, I did not.

Q And you didn't go back and compare how the black population was added between the '97 plan versus the 2001 Plan?

A No, I did not.

Q All right. Now, I want to turn to Table 5, and explain to me what this is.

A This is the number in percent of registered voters of each race and each party who are in CD 1 from the set of counties in which CD 1 is located.

Q Okay. So the CD 1 was located in different counties in 2001 than is located in 2011, correct?

A Correct.

Q Okay. So registered voters in the envelope would include all of the registered voters that were in all of the counties that were in the 2001 version of CD 1?

A This is for the Rucho-Lewis map.

[394] Q Oh, okay. I'm sorry. Thank you. This includes all of the registered voters in all of the counties that are included in the 2001 version of Congressional District 1?

A Yes.

Q Okay. And then I have a question about how did you – when it says Democratic white and black, what does white mean? Is that non-Hispanic white, or is that white including Hispanics?

A This is from the registration data, so this is you identify as white. There's no overlap of white and Hispanic the way the registrar records race, as I understand it, and I believe – to clarify the earlier question, I believe this is a super set of the counties that were in either version of the map.

Q Excuse me?

A I believe this is the super set of counties that are in either version of the map. There's only a small difference, but I believe that's correct.

Q Okay. Well, Durham County was added to –

A Correct.

Q That's a lot of population, right?

A Sorry, go ahead.

Q And the other district was underpopulated by 95,700 people?

A Correct.

[395] Q Okay. And the 2011 1st District was not in James County, right, if you look up at the map?

A Correct.

Q And the 2001 version was in James County.

A Correct.

Q All right. Now, if you turn to Table 6, if you look at the column that says "registered voters group in envelope."

A Correct.

Q Those numbers are identical, and Table 6 is for the 2001 congressional CD 1, right?

A Correct.

Q And the numbers that you've got of registered voters in group of envelope for the 2001 Plan in all those categories is identical to the registered voters you have in the envelope for the 2011 version of Congressional District 1?

A Correct. If I recall this column, it's the super set of all the registered voters in either county – in either set of counties.

Q Okay. So in other words, some of the counties that are in this super set are not in the 2011 version of Congressional District 1, is that right?

A Correct.

Q And some of the counties that are in the super set are not in the 2001 version of Congressional District 1?

A Correct. That's one way to do the analysis.

[396] Q Okay. Well, you didn't – that's not explained in your report, is it?

A I didn't look back for the explanation, but I'll take a look if you'd like.

Q Sure.

A Okay. It's not clear in paragraph 20 that that was what I was doing, but that is what I was doing.

Q Okay. So when you did the envelope for Congressional District 12, you used all the same counties?

A Correct, because the same counties are covered.

Q Okay. So you're saying that the envelope for District 1 in the 2001 Plan can be combined to form a super envelope with the counties that are in the 2011 Plan?

A Correct, and the idea is if you draw the map, you can start with the set of counties where you're going to position the map. That's the area where I'm going to locate the district, and, you know, Maptitude has counties in like geographic layers. You can actually just click on counties and pull them all up and put them all in your district and then carve right around them. So if you take that as the super set of counties, just like the super set of Voting Tabulation Districts, other Voting Tabulation Districts that were in the district before and the Voting Tabulation Districts that are in the district after, so you can just take the super set of counties.

[397] In CD 12, there's no choice to be made because it's the same counties in CD 1. There's a choice to be made as to whether or not you do it – you have different subsets, and in this case – in this particular result, I combined the two sets of counties just because that's a description of the area in which – or the region, the state, in which the district is located.

Q If you had just looked at the counties – did you look at the counties that were included only in Congressional District 1 in 2011 and calculate – make your calculations just based upon the actual counties that the first Congressional District was in in 2011?

A Yes, I did, and I had very similar results. I didn't present them in the analysis, but I then had a choice to make about which analysis to present, so I presented it this way.

Q Okay. You presented this one, and you didn't explain in your report that you'd combined the envelope for the 2001 and the 2011 districts?

A No. The envelope was a set of counties where the district was located.

Q Well, did you know that the 1997 version of the 12th District was drawn into Iredell County?

A I did not know that.

Q Okay. Under your theory, could you have included Iredell County into your envelope theory and created a super set of [398] counties for a super envelope?

A Potentially.

Q And could you not have added some other counties? Why was District 12 limited to the six counties in which it was drawn?

A One could spread out, but the idea is if you start with county concept of the location of the districts, which is a very old, traditional definition of where districts are and how they're constructed and then imagine where the district is located within that set of counties, then that's the definition I was following, and that's what defines where the counties were that I analyzed for CD 12.

Q Okay. Now, looking at Table 5, did you look at voting results for people that were moved into CD 1 versus the voting results for any election of people who were moved out of CD 1?

A I don't recall doing this exact table analogously for – I don't recall if I did that or not.

Q Okay. And then did you attempt to discern where any of the individuals who were moved into the CD 1 lived, which VTDs they lived in?

A Well, the VTD analysis does look at – the VTD level analogs this data.

Q Okay. Like, for example, the Republicans that you say were 69 percent of the blacks within the super envelope which includes all the counties for the 2001

and 2011 Plan, do you know where those black Republicans lived?

[399] A No, I don't.

Q And you don't know – and you don't know where anyone on this chart lived, which VTD? A No.

Q Okay. And also you make the point the 69.2 percent of the black Republicans were moved into CD 1 on Chart 5, right?

A Are included in, yeah.

Q Yeah. But that's a total of only, what, 9,000 people?

A Correct.

Q And that compares to black Democrats where you say that 72.1 percent were included in – from the super duper envelope were included in CD 1, but the gross number for that is over 300,000, correct?

A Total black registereds are 312,000.

Q So the 69 percent of the Republicans moved in versus the 72 percent, that's not really a good comparison, is it, because the numbers are so much lower for Republicans?

A It's exactly the right comparison. And you could draw the comparisons another way, which is you can take – within the Democrats, you can take the odds ratio of the blacks to the whites. So you can take an odds ratio like you have in medicine and medical tests, what's the odds of getting cancer or something. So you can construct an odds ratio which gets rid of that baseline problem. I didn't present them in a table because they're hard to describe, but the odds ratio show even [400] bigger proportionate disparities.

Q Okay. But do you have any evidence that the map drawer in this case looked at registration statistics?

A I don't know what the map drawer looked at beyond what Dr. Hofeller has testified in his reports.

Q But you've read his testimony?

A I've read his reports, yes.

Q And did he say that he looked at registration statistics?

A No, he said he looked at the Obama '08 vote.

Q Okay. Table 6, this is the same as Table 5 except for this is Congressional District – what's different? What's Table 5 versus Table 6?

A Table 5 is for the boundaries of CD 1 under the Rucho-Lewis map in this area. Table 6 is the boundaries of the CD 1 under the benchmark or 2001 to 2011 map.

Q All right. And the gross numbers of individuals included in the 2001 CD 1 are identical?

A Correct.

Q And this was a district that was underpopulated by 97,500 people?

A Correct.

Q All right. Let's turn to Table 7. Can you again tell us what this is.

A This analysis corresponds to the race and party – the number and percent of registered voters in a given race and [401] party who are in CD 12. It's analogous to Table 5 but for CD 12.

Q Okay. Now, again you looked at registered voters, right?

A Correct.

Q And could you have done this same analysis based upon election results?

A No.

Q You couldn't have looked at the election results in the VTDs that were moved in and out?

A I don't know how blacks and whites definitely voted. I do know how blacks and whites are definitely registered. So I'd have to make additional assumptions and make some additional estimate in order to do something approximating this using election results. Because that's what's unique about the registration data. They tell us how many blacks are registered. In other words, how many blacks chose Democrats, how many blacks chose Republicans, how many blacks chose to be undeclared, how many whites chose to be Democrats, how many whites chose to be Republicans, how many whites chose to be undeclared without me making an assumption about how the correlation between BVAP and election results implies a relationship; and as I noted earlier in testimony today, I determined that a relationship between BVAP and, say, the Obama vote was pretty weak compared to the relationship between black registration rates and Obama votes. So I thought the [402] registration rates were the better indicator of the underlying relationship between party and race.

Q Registration results – well, let me rephrase that. If you only looked at the election results, you cannot tell the race of the voter, is that right?

A You can make an estimate of race of the voter using ecological regression or ecological inference.

Q Well, I didn't say doing an ecological regression analysis. I said if you're just looking at the election results, you don't know the race of the voter.

A To the extent the two are correlated, you can make estimates about the racial composition of the areas you're moving around.

Q But the election results don't – the election results say 70 percent Obama, 30 percent McCain in this VTD, and that tells you nothing about the race of the voters, is that correct?

A It can tell you something about the race of the voters in an area. It doesn't tell you anything about the race of the individual voters who cast ballots or individual voters who chose the Democratic or Republican Party.

Q Right. So if all you looked at was the election results for each VTD, you would not know what the race of the voter was – voters were if that's all you looked at?

A You'd know the relation – so ecological regression is the tool we would commonly use to determine –

[403] Q I didn't ask if you did an ecological regression analysis. I'm asking you if you just looked at the election results by VTD, just like you looked at the registration results by VTD. If you just looked at the election results, that would not tell you the race of the voters who voted for Obama versus McCain, would it?

A Unless you did an estimate, which is a common form to – approach to that problem. So what researchers do in this domain is they do a data analysis to estimate what the proportion of blacks who voted for McCain is, proportion of whites.

JUDGE OSTEEN: Okay. The question is not how to do it. The question is just very simply if you look at this information, can you tell?

THE WITNESS: People in my business estimate that quantity, and it's a less good estimate than these figures. But you can't tell at the individual level how individuals of different races voted.

JUDGE OSTEEN: All right. Let's move along,

Mr. Farr.

MR. FARR: Thank you, Your Honor. Thank you.

BY MR. FARR:

Q Now, I want to turn to your second report, which is Plaintiff's, I think, Exhibit 18. Looking at – first of all, let's look at paragraph 10. This exhibit, Doctor, was prepared [404] by you after you reviewed Dr. Hofeller's report?

A It was prepared – filed February 3, 2014.

Q No, I'm looking at your second report. I've got a date of

May 6. This is Exhibit – I'm sorry, it's Exhibit 18.

A I'm looking at Exhibit 18 in my book and it says, document filed 02/03/14 at the bottom. I don't have a front page to this.

Q Okay. Is there a signature page at the back?

A Yes, January 29, 2014.

Q Okay. I stand corrected. I'm sorry.

But you prepared this after you saw Dr. Hofeller's

report?

A Correct.

Q Now, I want to – you criticized Dr. Hofeller because of his statement that he used the Obama/McCain race and looked at those vote totals on a VTD basis to draw up District 12. Have you ever – you've admitted you've never drawn a redistricting plan for a state legislature?

A Correct.

Q And your experience in drawing redistricting plans is for – in litigation?

A Correct.

Q Where you're working for lawyers who are trying to prove a case?

A Correct. Well, the remedial phase in Florida was actually

* * *

[408] said, why wouldn't you have checked Dr. Hofeller's testimony by looking at other election results in the VTDs? Why did you go to registration instead of election results?

A I was being responsive to Dr. Hofeller's report in that specific analysis in that table.

Q Okay. Now, I want to talk about Table 1. I'm getting toward the end of my questions of you, Dr. A, and I just have a few more.

Table 1 is your correlation chart. Do you see that?

A Yes.

Q Now, what data did you use to make this chart?

A I used – this is at the VTD level, so –

Q The what level?

A The Voting Tabulation District level. So I took the black voting-age population aggregated to the voting tabulation level and the white voting-age population as a percentage of voting-age population aggregated to that level, and the Obama vote aggravated to the voting tabulation level – Voting Tabulation District level.

I also took the black registration data as a percentage of all registered voters aggregated to that level and the white voting – white registered voters aggregated to the – as a percentage of all registered versus aggregated to the voting tabulation level, and then I ran the correlation between the Obama vote and each of those indicators across [409] Voting Tabulation Districts, that is, how much does it change or how much does it vary together, whatever the racial indicator is, and the Obama vote share at the Voting Tabulation District level.

Q Okay. So let's talk about this for a second, because – did you do something called a scattergram?

A I don't recall making a scattergram of this.

Q Is that what you typically do when you do one of these correlation reports? You draw a line, and you've got points above the line and below the line?

A Well, correlation is a statistic. It's a computation of the product of the two numbers, the Obama number and the racial number, divided by the standard deviation of the Obama vote across Voting Tabulation Districts and the standard deviation of the racial indicator. You can make a plot in connection with it. The plot is not the correlation, but the plot shows relationship.

Q Did you do such a plot?

A I don't recall.

Q If you – you didn't attach one to your report, did you?

A No.

Q And you didn't attach your calculations to the report?

A No, the computer did that.

Q Okay. And so, when we're looking at – just to take one, for example, you've got an entire state black VAP – what does [410] that mean "black VAP"?

A That's the correlation between Obama's percent of the two-party vote in every Voting Tabulation District in the entire state correlated with the black percentage of the voting-age population in every Voting Tabulation District in the state, and the relationship between them as I just described using that formula, which is the formula for Pearson's correlation.

Q Okay. I had a basic question. When you say "black VAP," what black VAP are you referring to there?

A Any part black. I'm being consistent with –

Q Okay. And what did "white VAP" mean?

A Single-race non-Hispanic white.

Q Okay. And so, you've got plus 60 percent. That doesn't mean 60 percent of the blacks voted for Obama, does it? A No.

Q Explain to the Court what that actually means.

A The correlation coefficient runs from negative one to positive one. A perfect correlation that's a positive relationship would be one, and you can't go above that. A perfect negative relationship would be

negative one, and you can't go below that. Zero would be absolutely no correlation.

Correlations between plus or minus .2 are usually statistically insignificant. It depends on how much data you're looking at. Correlations that are not very strong [411] typically run up to about .6, .7, and then very strong correlations are usually above .7, .8, .9.

Q All right. So I think you said – and if you haven't, correct me – but wouldn't you agree that in North Carolina, over 90 percent of the African-Americans will vote for the Democratic candidate?

A Correct.

Q Okay. So explain how that jives with the fact that you're saying there's a .6 percent correlation of the black VAP in the entire state.

A That says that if I look across the Voting Tabulation Districts, the extent to which Obama vote covaries with or moves up and down with the percent black in the Voting Tabulation Districts has a correlation of .6. It's moving up and down some, but it's not super tight.

Q Okay. Now, the black VAP, could that – you've got a higher correlation for registered black, right?

A Correct.

Q Okay. Could the lower correlation be the function of the fact that some black voters aren't voting or are not registered?

A Possibly.

Q Okay. And did you ever try to correlate actual turnout of black voters versus the Obama vote?

A No.

[412] Q Now, and of course, the registered black voters and the correlation with the Obama vote, there'll be some registered black voters that don't vote, correct?

A Correct.

Q And that – and for the registered black voters that don't vote, that would make the correlation lower than what it would be if they all voted?

A Or those that crossed over and voted for the other party. Other – a lot of things contribute to that.

Q Yeah. But there's not many that cross over and vote for Republicans, are there?

A I wouldn't expect so –

Q Okay.

A – but there are some.

Q But the correlation between registered blacks and Obama vote would be reduced to the extent that some registered blacks did not vote?

A That would be one of the factors that could contribute to a reduction in the correlation.

Q Okay. And if you actually looked at the actual turnout by black voters and tried to correlate that to the Obama vote, don't you think that the correlation would be higher than what you've reported for voting-age population and registered black voters?

A May or it may not be, I'm not sure. But the correlation [413] in CD 12 between black registered voters percent and Obama percent couldn't get much higher.

Q Okay. But I'm looking at the Table 1. Isn't it true that the correlation might be reduced by the fact that some black voting-age individuals are not

registered and some of the registered blacks do not vote?

A Those could be explanations. Keep in mind this table is prepared responsive to Dr. Hofeller's comment that I should have done something involving a relationship between vote share and black voting-age population. And the point, in the context of this response report, is to show that, in fact, the numbers I'm looking at, the black registration rate, are, in fact, a much stronger indicator, which confirms that that was the right decision.

Q Yeah, but you didn't look at the turnout numbers. You didn't attempt to correlate the actual black turnout with the Obama vote?

A No, but the analysis – this is responsive in the context of an entire analysis that begins and sweeps through geography, racial composition of districts, and then focuses on registration to see how the racial composition of the districts is being determined, and then testing race versus party. And this is responding to a criticism that I looked at the wrong data because I should have looked at some other data. And the other data, as far as I could tell from Dr. Hofeller's report [414] that I should have looked at he recommended, was black voting-age population.

Those are just saying – the force of his criticism is I shouldn't have done that. I did – given the two, I should have done this one. And I can't imagine, especially in the area of CD 12, finding a stronger indicator.

Turnout may or may not be discorrelated, depends on who else is turning up in the area. All the black voters might have turned out in an area. But the turnout is also driven around by the denominator, which is the turnout of all the other groups. So I'm not

sure if turnout would have been more strongly correlated or less strongly correlated.

Q Okay. All right. Now, Table 2, you analyzed the city of Durham, and you looked at how many blacks and whites were included in CD 1 versus CD – whatever the other Congressional Districts are in Durham County, correct?

A Correct.

Q Now, did you look at any other counties – or did you look at any counties to make this analysis under the 2001 1st Congressional District?

A No, I did not.

Q So you didn't look at any other divided counties in the 1st Congressional District to see how they might compare with Durham in this analysis that you've done in your report?

A No. This analysis is responsive to a comment by [415] Dr. Hofeller that one of the reasons for shifting the district around was to capture urban areas because that is where the population growth had been. The major urban area that was captured in the redrawing of CD 1 was city of Durham and parts of county of Durham. So I decided to analyze what actually happened in the redrawing of CD 1 in the area of the city of Durham and the county of Durham to see if this was, indeed, capturing an urban area as an urban area or just capturing the blacks in that urban area. And what I found was it predominantly captured the blacks in that urban area.

Q But you didn't look at – how any of the other divided counties, either in 2001 or 2011, compared in terms of the percentage of the black population that was in the majority-black district versus that percentage that was out of the black district?

A No, I just looked at the city of Durham and the county of Durham.

Q Okay. And did you attempt to go through any of these districts to compare the percentage of black population, say, for example, in Congressional District 1 versus the percentage of black population in the other Congressional Districts that might be in the county?

A Say that again. I'm not sure I followed the question.

Q Did you ever take a county and say, for example, Durham's got Congressional District 1, and I can't remember – I know 4 [416] is in Durham. There may be another one. Did you ever think about looking at the percentage of the population in Durham County that's black that, say, is in Congressional District 4 versus Congressional District 1?

A This is the population of the entire city and county of Durham, so everything else is in those other districts.

Q So the answer is you didn't do that?

A So I didn't look at specific districts except to say whatever's not in this district is in every other district.

Q All right. Now, Doctor, did you ever look to see which of the Congressional Districts were the most overpopulated?

A No.

Q Okay. Would you dispute me if I told you that the 4th Congressional District was one of the most overpopulated districts in the 2001 Congressional Plan?

A I would not dispute you.

Q Okay. And can you tell me – confirm for me right now that Durham County was in the 4th District in the 2001 Congressional Plan?

A Yeah – yes, it looks like it's entirely contained. MR. FARR: Okay. That's all I have, Your Honor. Thank you.

JUDGE OSTEEN: Redirect?

[417] REDIRECT EXAMINATION

BY MR. HAMILTON:

Q Yes, Your Honor, just a couple of questions here. Let's start with where we just left off, Table 1, Exhibit 18. That's the reply report. Do you have that there in front of you?

A I do.

Q So you were looking here to address a critique leveled by Dr. Hofeller, is that right?

A Correct.

Q And of the – your conclusion was that the Obama share of the two-party vote was very highly correlated to the black registered voters in CD 12, is that right?

A Correct.

Q And how high was that correlation?

A .92.

Q How high does the scale go?

A One.

Q Is it – would it be – I guess it's possible to be more highly correlated, but that's close –

A Only if it went all the way up to one, yeah.

Q All right. Now, he also asked about the turnout and whether turnout might have had an effect. Do you recall those – that line of questions?

A I do.

Q Okay. In your experience as a social scientist studying [418] the historic 2008 presidential election, how was the turnout in the black community? Was that a particularly low turnout election for the African-American community in the United States?

A Nationwide, it was a record high.

Q A record high.

A Right.

Q All right. Before lunch, Mr. Farr asked you some questions. He said you didn't have any idea about the political configuration in other districts and how that might have affected CD 1 and CD 12. Do you recall that line of questions?

A Yes.

Q Okay. And I believe you testified you didn't know anything about it, about what happened there?

A Right.

Q Okay. But whatever it is that they did, whatever it is that they did in all those other districts and all those other parts of the states, what was the effect in CD 1 and CD 12?

A The effect was to increase the black voting-age population in CD 1 and CD 12 and to include blacks within each partisan group, more black Republicans, more black Democrats, more black undeclareds.

Q And I think Mr. Farr covered this at least three times about Bethune-Hill and the analysis there. That

was a case in [419] Virginia involving the Virginia State House of Delegates, that is correct?

A Correct.

Q And you did an analysis there of the VTDs that were moved in and out of the House of Delegates Districts that were at issue, is that right?

A Correct.

Q Why is it that you looked at election results there instead of voter registration?

A Because they don't have voter registration records with race and party on the file that are available to us to analyze.

Q And I believe you said you had – there was only like eight states in the United States that actually provide that kind of data?

A Correct.

Q North Carolina is one?

A North Carolina is one.

Q If Virginia had been another, would you have used that data in Virginia?

A Yes. And we used it in Florida in analyzing the map that at the state court issue, but analyzing the performance of those districts and the racial –

Q And there's a suggestion that the Supreme Court decision in *Cromartie* said that there's something wrong with that. Did you actually consider the relationship between voter [420] registration and actual voter results in these two Congressional Districts in North Carolina in connection with this analysis?

A Yes. In connection with this analysis, I looked to confirm that I was not crossing that – what I view as my reading as an analyst, not as a lawyer, of the *Cromartie* decision is you can look at registration statistics since they are really predictive of voting behavior. So I looked to see if they were predictive, and they were, so I went ahead and analyzed them.

Q Okay. Small point. When Mr. Farr just a few minutes ago was talking to you about Exhibit 17 and the maps, there's eight maps in there, and the lack of a key on the shading, I think you said these are in deciles. What does that mean?

A I think they're in 10 percent increments.

Q Ten percent increments.

A I believe that was the map that we included.

Q Now, Mr. Farr asked you a couple of questions about looking at other election results in connection with your analysis. You did look at other state-wide election results in Virginia in these two Congressional Districts in connection with your analysis, correct?

A Correct.

Q And what were those two?

A The Governor 2008 and the Senate election that same year.

[421] Q And were they more or less closely correlated with political performance than the Obama 2008 election results?

A Those two other elections in 2008 were much more highly correlated with partisan registration than the Obama vote was.

Q And the Obama vote is much more highly correlated with what?

A Governor 2008.

Q No. The Obama 2008 election result was highly correlated with?

A Black registration.

MR. HAMILTON: Thank you, sir. No further questions. JUDGE OSTEEN: Anything?

MR. FARR: Just very briefly, Your Honor.

RECROSS-EXAMINATION

BY MR. FARR:

Q You studied these other two elections using your correlation analysis?

A Yes, those are correlations.

Q Yes. And you didn't look at the actual vote totals by VTD for either Governor in 2008 or the Senate election?

A No, I did not.

MR. FARR: That's all, Your Honor.

JUDGE OSTEEN: All right. You may step down.

(At 2:31 p.m., witness excused.)

MR. HAMILTON: Your Honor, at this point plaintiffs [422] are prepared to rest. There's only one exhibit I think that's still at issue that we had offered. Oh, may Dr. Ansolabehere be excused?

MR. FARR: He may be, Your Honor. We have no objections.

THE COURT: All right. Yes, sir.

MR. HAMILTON: So there's – we've offered a number of exhibits. I believe they've all been admitted without objection, and the sole remaining objection is Plaintiff's Exhibit 13. The objection that was raised at

the start of the trial was attorney-client privilege, and I'm prepared to address that if the Court would like to hear that.

THE COURT: Where is 13?

MR. HAMILTON: I have a sole copy I can hand up. It's going to be in there.

THE COURT: All right. Let me get some people squared away on this email. Who is Brent Woodcox?

MR. FARR: Your Honor, may I address that, Your Honor?

THE COURT: I'll give both of you an opportunity.

MR. FARR: I'll just explain the people if I can borrow this for a second.

Brent Woodcox – first of all, I'm Tom Farr. That's who that person is, and I was the counsel to the General Assembly during the redistricting process. These are notes [423] that I – email that I was sending to my clients and Dr. Hofeller who was working with us as a consulting expert. So Brent Woodcox is the – he was the redistricting counsel for the Senate.

Bob Rucho is the Senator Rucho who was the cochair of the redistricting committee. Dave Lewis is the – the cochair of the redistricting committee. He was a representative. Jason Kay was the general counsel for the speaker. Jim Lang was the chief of staff for the president pro tem of the Senate. Dale Oldham who is here in the courtroom today was associated with us as counsel. Then you have Dr. Hofeller and then you have Phil Strach, who is my partner sitting here today, and then Kathy Youngquist who's my secretary to whom I send copies of every email I ever send to anyone.

THE COURT: Who is the dlodsq@aol.com?

MR. FARR: That would be Dale Oldham.

THE COURT: Dale Oldham?

MR. FARR: Dale is an attorney from South Carolina. He is – he practices in the area of redistricting and he was helping us out during the 2011 redistricting process.

THE COURT: Your client was the General Assembly?

MR. FARR: Yes, sir. The client was actually the speaker pro tem and the – the speaker of the House and the president pro tem of the Senate and their staffs through whom they operated.

[424] THE COURT: One more, Mr. Farr; the celticheal@aol.com?

MR. FARR: That would be Dr. Hofeller.

THE COURT: Okay. So Tom Hofeller and the celticheal@aol are the same?

MR. FARR: Yes, sir.

MR. HAMILTON: Your Honor, the document might once have been privileged, but it isn't anymore. This document was not only produced but introduced into evidence during the state proceedings in this case. The document is scattered around. I have a copy of it. There's copies in all these books over there. There's copies over here. Whatever privilege it – that once attached to this document was long ago lost as a result –

THE COURT: So you contend it's waived by publication?

MR. HAMILTON: That's right. And, Your Honor, privilege is not an objection to admissibility. The document's relevant. There's no question about its authenticity, and so the fact that it might once have

been privileged is simply not a relevant objection, I don't think.

THE COURT: All right. Mr. Farr, no challenge to the fact that it may have at one point been privileged, but now it's published?

MR. FARR: Well, Your Honor, I would just say, with [425] complete candor, we had no idea it had been published. If this is in the record in the other case, it never came up during the case. I don't recall anyone being examined about it in the other case. The Court will understand we've actually done you all a favor in limiting the number of documents you're getting so 35 volumes or whatever it is. There's quite a bit of documents that were produced in this case; and honestly, Your Honor, we did not know this document had been produced.

I'll accept counsel's representation that it was produced in the *Dickson* case. I don't recall it being introduced into evidence. I don't recall it ever coming up until I saw it on this exhibit list for this case.

MR. HAMILTON: May I respond, Your Honor?

THE COURT: Um-hum.

MR. HAMILTON: The document was Exhibit 554 in the Hofeller deposition in the state case. That's the *Dickson* case and you can tell that from the sticker on the face of this exhibit. It's stickered right there. It's also on file with the North Carolina Supreme Court in connection with the appeal of the *Dickson* case. It's on file with the D-V-D that was earlier lodged with the Court in connection with this case in this court as part of the record from the state case that was presented here and then, of course, we also identified it.

THE COURT: I'm not cutting you off in term of merit, but it seems to me there's two issues; and, Mr.

Farr, I don't [426] know if you're running out of lawyers over there in your Raleigh firm, but if it was admitted in the state court proceeding, and if it is part of the record in the North Carolina Supreme Court, then it seems to me at that point it's been disclosed. Now, you may have an inadvertent disclosure or something like that. If you don't know at this point where that document has been or how it wound up, then I think –

MR. FARR: I know, Your Honor, but it does have – I apologize for not noticing the exhibit sticker on it. The only thing that I would – if the Court would give us overnight to check on this. I want to see if we raised an objection to it in the deposition. If we didn't do that, then I would say we waived it.

THE COURT: Since it's coming up now, that's what I was going to suggest is that whenever we take a break this afternoon, you get somebody checking to see where this document has been as best you can, and then we'll address it tomorrow. So I'd suggest at this point that we take it subject to anything you want to present to us by, say, noon tomorrow.

MR. FARR: That'd be fine, Your Honor. Thank you, Your Honor.

MR. HAMILTON: Thank you, Your Honor. With that, the plaintiffs rest their case.

THE COURT: All right. How do you want to proceed? It seems to me at this point, if you need to make some motions, [427] you can, but I'd like to keep plowing ahead with the evidence.

MR. FARR: Your Honor, we assumed that it's not necessary for us to make a motion at this case. I'm sure the Court's going to hear all the evidence. One thing I

would say is that we might need a few minutes to get our exhibits reoriented.

THE COURT: All right. I am going to say this while I'm thinking about it. I am really concerned – you all have done a good job with the booklets. I really – I personally really appreciate the way you've handled the exhibits. What I am worried about is that we're – we've got some number differentials that came up during the first part, and then we've got some 17s and 18s but they have stickers on them that may be different from the numbers, so at some point in time, it doesn't have to happen now, but before we close out and finalize this record, I think the lawyers or the paralegals or somebody are going to need to go through and make sure our official exhibit record matches what we've been looking at as we go along, and that may or may not be an easy task. It doesn't need to be done now. I'm not suggesting now, but within a week or so of trial, we'll need to have that squared away.

MR. HAMILTON: Absolutely, Your Honor. We've tried to – with respect to all the notebooks handed up, we've tried to make sure that they're simply duplicates of what's there and [428] the whole reason was to make life simpler and easier, and I hope we haven't inadvertently made it more complicated.

THE COURT: As far as I'm concerned, it has for me, but it's been a little quirky in terms of the way the numbers have been. Okay, this is Exhibit 5, and then we have Defendant's Exhibit – this Plaintiff's Exhibit 5, but the sticker says Defendant's Exhibit 5.65. You know what I'm talking about.

MR. HAMILTON: Absolutely.

THE COURT: We'll get that squared away after. Ten minutes to get your exhibits ready together?

MR. FARR: That would be plenty, Your Honor.

THE COURT: All right. Let's take a recess for 10 minutes.

(At 2:43 p.m., break taken.)

(At 2:57 p.m., break concluded.)

THE COURT: All right. So, Mr. Hamilton, we've got a little housekeeping matter?

MR. HAMILTON: We do indeed, Your Honor. Thank you for the remainder we've worked with the clerk who has been extremely helpful in pointing out –

THE COURT: Ms. Powell is very good.

MR. HAMILTON: I can certainly agree with that. There are four exhibits that were identified during the course of plaintiff's case, but not moved into evidence. I've talked [429] with Mr. Farr, and ask the Court to reopen plaintiff's case, he has no objection, to move the admission of these four documents.

THE COURT: All right.

MR. HAMILTON: They are D511 – 5.11, D19, D118, and D30.

THE COURT: D30. So exhibits marked D5.11, D19, D118, and D30 are admitted in the plaintiff's case. No objection?

MR. FARR: No, Your Honor.

THE COURT: All right. Those exhibits are admitted.

All right. So a couple of housekeeping matters from this side. I'm going to start backwards. Tomorrow, anticipating the close of evidence, we've talked about having closing arguments. I think from our

perspective in terms of helpfulness to the Court, rather than the standard closing argument, our preference would be to have an argument like a motion or circuit argument where you may get questions – both sides may get questions from the Court. So prepare – we'd like to set a time, and the time is going to be related to how much time is left when all the evidence is in, but you should prepare yourself to deliver a closing argument, but you should be ready to answer questions about your case from any of the three judges.

All three of the judges up here, generally speaking, [430] I think I can speak for all three of us, backing down, we do like to ask questions. We've been very, shall we say, courteous of the presentation of the evidence, but going – from this point forward, it may be that you get some questions from the Court – or the witness gets some questions from the Court. If so, you know how that procedure works. Just stand down with your questions and let the judge get finished with whatever they want to ask.

Witnesses for – who do you anticipate calling during the course of the defendant's case? If you can give us an outline now.

MR. FARR: Dan Frey who works for the General Assembly will be our first witness.

THE COURT: Dan Frey?

MR. FARR: Yes, sir. Dr. Hofeller, and I'm not quite sure what order, but Senator Rucho will testify and Representative Ruth Samuelson will testify – former Representative Ruth Samuelson.

THE COURT: Sanderson?

MR. FARR: Samuelson.

THE COURT: Samuelson.

MR. FARR: Who many of us wish would have stayed and became Speaker of the House. She went back to her family. So those would be our witnesses, Your Honor.

THE COURT: All right. You may proceed to call your [431] first witness.

MR. PETERS: Thank you, Your Honor. The defendants call Dan Frey to the stand.

(Witness sworn by the clerk.)

DAN FREY,

DEFENDANT'S WITNESS, SWORN AT 3:01 P.M.

DIRECT EXAMINATION

BY MR. PETERS:

Q Good afternoon, Mr. Frey. The first thing I'm going to do is encourage you to do your best to talk directly into the microphone, and even then you probably need to speak up just to make sure everybody can hear.

A All right.

Q Could you state your name for the Court and give a brief educational – your brief educational background.

A My name is Dan Frey. My educational background, most recently I received a master's degree in geography.

Q All right. And what is your occupation?

A I work for the North Carolina General Assembly for the IT Division, and I work specifically with things related to geographic information systems, and so my role related to redistricting is to support and make

sure everyone has hardware and software and to assist in compiling the database that's used for redistricting.

Q I'm sorry. I didn't catch the last part of what you said.

[432] A Part of that is to pull together the different sources of data to put together the database that's used in redistricting.

Q All right. And how long have you been in that position?

A Since 1995.

Q All right. Have you participated in some way or another in all the redistricting efforts since 1995?

A Yes.

Q Now, are you part of what's sometimes called the central staff or the nonpartisan staff at the General Assembly?

A That's right, yes, I am – yeah, I'm nonpartisan staff as well. Fulfill requests from members of either party.

Q Would it be a fair characterization to say that the central staff is available to any member of the General Assembly to do whatever tasks for them that member might request?

A Yes, absolutely.

Q All right. So, in essence, you work for all 170 members?

A That's right.

Q Mr. Frey, I'd like to just take you through what are going to be a number of exhibits, I believe, just so you can give some context for them and some background on them. The first thing, I believe you'll

find at your stand a notebook that's titled Historical Congressional Maps 1991 through 2011, and down in the bottom corner there's a blue tag that says Defendant's Exhibit 126.

[433] A Yes.

Q Do you see that? I'd just like to take you through what's in this notebook so that you can identify it, give a little background on it. Let me ask you to start at Tab 1 which is Defendant's Exhibit 3.84. Do you see that?

A Yes.

Q And can you identify what that exhibit is.

A This is – yeah, the 19 – well, it's a map of the 1991 Congressional Plan, which was put into place well before I got to the General Assembly. I think 1991 Congressional Base Plan #6 is the title.

Q All right. Did you pull this information together for what's here for the 1991 plan?

A Yes, I think I hunted this down. Yes.

Q And let me ask you, if I talk about a stat pack, do you know what I mean?

A Yes, there's – typically for when plans are introduced in committee, there will be a map, and then there will also be a packet of information – packet of reports with statistics and stuff that go along with it.

Q And is stat pack short for statistical pack or statistical –

A Yeah.

Q And is there a stat pack with the 1991 Congressional Redistricting Plan here?

[434] A No, there's not.

Q And do you know why that might be?

A I don't believe one was available. I mean, this – I was able to hunt down a map in the legislative library, but I think that was maybe before the – we had nice stat map – or stat packs.

Q Does it maybe go back to before redistricting was – could be done as easily on computer and was more pen and pencil, paper?

A Well, in 1991 it would have been Plan '90, the old mainframe system. So certainly the technology's evolved a lot.

Q Okay. Now, let me ask you to look at Exhibit 2 – excuse me, Tab 2, which is Defendant's Exhibit 4.1A. Can you identify what 4.1A is?

A Okay. So this is a map of 1992 Congressional Base Plan 10.

Q And what is Congressional Base Plan 10 from 1992?

A This also predates my being at the General Assembly, but I believe due to litigation it was – well, yeah, that it was – this was a subsequently enacted map.

Q Now, let me ask you to look at the next page which says – there's a sticker at the bottom that says Defendant's Exhibit 4.1. Do you see that?

A Yes.

Q And the page itself says Exhibit 1, fourth affidavit of [435] Dan Frey, 1992 Congressional Base Plan 10. Do you see that?

A Yes.

Q And looking at that on the next few pages, are these materials you did prepare for an affidavit at some point?

A I believe so, yes.

Q Can you describe briefly what's on the next two pages?

A Okay. Well, these are – I think nearly all, except maybe for that first map, I think this stuff is all posted on our website, but this would be a report from our Plan 90 or 1990 Redistricting System, and so it's – you know, it's got district totals, race breakdown for total population, and it's just single race categories, because in 1990, they – the census data did not contain multi-race.

Q I'm sorry, what was the last thing you said?

A In 1990, the census data did not have multi-race categories so, yeah, this is what was available.

Q All right. So I know you were here earlier when Dr. Ansolabehere testified about any part black, total black and testified about ethnicity, Hispanic, non-Hispanic. Let's talk to that just a minute. You said that at this stage the census did not count for multi-race?

A That's right.

Q And let me back up. In the course of doing your job, do you have to deal with census data on a regular basis?

A Yes, that's sort of our main – yeah, one of our big data [436] sets we have to process.

Q All right. So what do you understand it to mean – I'm looking at the page that at the top says "district summary, total populations, all ages," and you see columns that say "total white, total black, total

American Indian, total Asian, PI, and total other." What do you understand those columns to represent?

A Well, they're essentially – I mean, those are the race breakdowns. Those were the choices that were available for people to elect in the census; and so, you know, I mean there has been some talk of any part black and whatnot, but that wasn't a factor here because this was just – that didn't exist yet.

Q All right. And is the same true of the next page that says "district summary voting-age populations"?

A Right, so this is basically the exact same thing but with voting age instead of all ages.

Q Right. Do you know if at this time the census was inquiring about ethnicity?

A Yes, they did have ethnicity.

Q And what is the inquiry for ethnicity?

A Well, the – as far as the citizen is given a choice, like when they fill out a census form, you know, there's a Hispanic or non-Hispanic is basically the choice which is separate from race, independent of race.

[437] Q So when you say separate or independent of race, does that mean somebody filling out the census form is asked to indicate a race and also asked to indicate an ethnicity?

A Yes.

Q All right. So, for example, could somebody indicate that they are white and Hispanic?

A Right, correct, any of the race categories – you could be in any race category and either Hispanic or non-Hispanic.

Q So someone could indicate they are black and Hispanic?

A Correct.

Q Or any of those and non-Hispanic?

A Yes.

Q All right. Thank you. Let me ask you to look at what's behind Tab No. 3. And the first page of that is marked Defendant's Exhibit 4.2A. Can you identify what that is?

A Okay. That's a map of our '97 House/Senate Plan A, which was, due to litigation, we had another plan created in 1997.

Q All right. And by this time you were at the General Assembly?

A Yes.

Q And were you involved in doing the – I'll call it, for want of a better term, the support work, the data support work for preparing that plan?

A Yes, yeah. At this time, right. I mean, basically I supported the redistricting system, though it had been built [438] before I got there.

Q Okay. Let me ask you to look at the next page, which is marked with the blue sticker, Defendant's Exhibit 4.2. A Okay.

Q And is this also from the fourth affidavit, your fourth affidavit?

A Yes, I believe so.

Q All right. If you'll look at the next two pages, I'll put it this way. Do these basically show the same kind of information as were shown for the '92 plan but for the '97 plan?

A Yes. These are also our standard 1990 reports.

Q Right. And, again, here is there a distinction made between someone who identifies themselves as only black and someone who identifies themselves as partially black?

A Right, so this was still with the 1990 census data so that there was no – there was not an option for parts black.

Q And thank you, for all three of these plans, the '91 Congressional Districting Plan, the '92 and the '97, is the data for all three of those data from the 1990 Census?

A Yes.

Q Okay. And let me ask you to look at what is behind Exhibit 4 – I mean, excuse me – Tab 4. The first page is marked Defendant's Exhibit 4.3A. And can you identify that?

A This is yet another Congressional Plan. This one drawn in [439] 1998 and enacted, I believe, at that time.

Q And was this, again, because of litigation?

A Yes.

Q And were you involved in the data support for that?

A Yes, I was in the same role.

Q All right. And behind that you'll see a document with the sticker that says Defendant's Exhibit 4.3.

A Right.

Q Is this also from your fourth affidavit?

A I believe so, yes.

Q And behind that, you'll see some data?

A Right.

Q And, again, this data, is it based on the 1990 Census?

A Yes, same format and same report.

Q And is it providing basically the same information but for the 1998 Plan?

A Yes.

Q All right. Now, let me ask you to look at defendant's – I keep saying this – what's behind Tab No. 5, the first page is marked Defendant's Exhibit 4.4A.

A Okay.

Q Can you identify what that is?

A Yes, this is a map of our 2001 congressional plan.

Q Do you know what the name zero deviation indicated?

A Well, I believe before, like in the '90s, they didn't [440] really zero out the populations between districts so much. Perhaps it refers to that. I'm looking over some of the data. Once we – I think once we got to 2000 they made the district total populations almost exactly the same.

Q All right. So the title may refer to exactly the same or as close as possible, exactly the same population between each district?

A That would be my guess, yes.

Q Okay. And is this the plan that stayed in effect for the

decade following 2001?

A Right, right.

Q All right. Now, let me ask you to look at the next page. It's marked Defendant's Exhibit 4.4. Is this also from your fourth affidavit?

A Yeah, I believe so. Okay. Yes.

Q In looking at the pages behind that, can you briefly describe what that is.

A Okay. Well, this – this is an – this is a new report now. This is based on the 2000 Census, and this is from – these are the reports that were in place for the 2000 redistricting standard reports, and you can see on the far right there's now a multi-race category.

Q And what does that category indicate? What does multi-race mean?

A Well, it simply means that anybody who said on their [441] census form that they were more than one race, and so here it's just sort of combined. Anyone who said they were more than one race, that's the total of those.

Q All right. Was there a breakdown available of the information on what races people chose where you – it can be broken down, or was it just all thrown into a multi-race category?

A Well, in this report it was put into one column, but the underlying census data was basically the same layout that came out in 2010, and it has a very long and detailed field layout.

Q All right. And let me ask you to look at the next page. Can you describe that briefly.

A Okay. So this would also be from the 2000 Census, and it simply breaks down the totals by district of Hispanic versus non-Hispanic.

Q All right. And then the two pages after that, is that a similar analysis for voting-age population?

A Yes, voting age and – yes, yes.

Q All right. Let me ask you to look at Tab 6, and the first page behind that is Defendant's Exhibit 4.5A. Is that the same congressional zero deviation map that's behind the previous tab?

A Yes, the same one we just looked at, same plan.

Q All right. And then the next page is Defendant's Exhibit 4.5. Is that from – is what follows that from your [442] fourth – an exhibit to your fourth affidavit?

A Yes.

Q All right. What's the difference between what's – the stat pack that's behind the map in Tab 6 and the stat pack that's behind the map behind Tab 5?

A Well, this one is a new series of reports. This one we came out with our – well, we had to redraw House and Senate districts in 2003, and so we created a new redistricting database, and we had new reports that were associated with it, and so this is that updated report format applied to the Congressional Plan.

Q All right. So it's a new format based on what was – you started using in 2003?

A Right, and the census data is the same, of course, because nothing – we didn't have new census data.

Q That's my question. Is this information based on the 2000 Census or the 2010 Census?

A You know, actually I need to – I need to be a little slower in looking at this because this one is indeed the 2010. That's what these reports are from.

They're from the 2011 round format which was similar in 2003, but, no, this is actually 2010 Census data.

Q All right. So this was taking the 2010 Census data and applying it to the 2001 map?

A Yes.

[443] Q All right. And let me ask you to look at – for the stat pack it says page 2 of 9. If you look at the court filing number down at the bottom it says page 27 of 45. It says stat pack report of total population by race and ethnicity.

A Yep.

Q All right. And do you see a segment that says total population by race?

A Yes.

Q Okay. And what are the categories that are listed under that?

A Well, total population by race we've got just an overall total, and then it's got breakdowns for single race white, single race black, native American, Asian Pacific Islander and other, and it's got multi-race, which would be everybody who's multi-race, and then it has multi-race black, which would mean anybody who is multi-race and one of the complement races is black. And then it has total black, which is the sum of the single race black and the multi-race black.

Q All right. So just so it's clear, the column that says NA, did you say that's Native American?

A Native American, that's right.

Q And the column that says A/PI, did you say that's Asian and Pacific Islander?

A Yes.

Q All right. And then do you see the second group of [444] columns that says total population by ethnicity?

A Um-hum, yes.

Q And what does that show – or what are the columns in that? What are the categories?

A Well, it's got Hispanic – just an overall Hispanic, and then it's got non-Hispanic, so it's got that basic breakdown, and then it also has white non-Hispanic.

Q All right. Let me ask you to look behind Tab 7, and the first page is Defendant's Exhibit 4.6A. Do you recognize what that map is?

A Yes, this is an alternative map that was submitted by the Southern Coalition for Social Justice.

Q And do you recall whether it was submitted while the redistricting plans were still under consideration before they had been enacted?

A Yes, I believe when I put this out on the chronology of our website, I think it was fairly early that we got this.

Q All right. And looking behind that at Defendant's Exhibit 4.6, do you see a page that says Exhibit 6 in your fourth affidavit?

A Yes.

Q All right. And is this information that you've prepared for your fourth affidavit?

A Yeah, I believe so.

Q And trying to keep this moving along, is this stat pack [445] basically the same kind of information as was shown for the last stat pack we looked at but for the Southern Coalition for Social Justice's plan?

A That's right. That's right. These are 2010 reports, 2010 Census data.

Q So it would have the same racial breakdowns and the same ethnic breakdowns, is that correct?

A That's correct.

Q All right. Let me ask you to look behind Tab 8, and the map that's marked Defendant's Exhibit 4.7A. Can you identify what that is.

A This is one of the earlier proposed plans, Rucho-Lewis Congress 1.

Q And proposed by whom, do you know?

A By the redistricting chairs.

Q All right. And this was you say proposed. Was this proposed in 2011 while the redistricting process was going on?

A Yeah, as part of that, that's right, yeah.

Q Now, looking behind that, do you see a page marked Defendant's Exhibit 4.7 that says Exhibit 7, fourth affidavit of Dan Frey?

A Yes.

Q And is this also material that you prepared for your fourth affidavit?

A Yes.

[446] Q And, again, just to keep it moving, the stat pack that's behind it, is it a similar in format to the two we just looked at but for Rucho-Lewis Congress 1?

A Yes, it's the exact – exact same format or standard.

Q And it would have the same racial and ethnic breakdowns?

A Yes.

Q All right. Let me ask you to look at behind Tab 9, and the map that's marked Defendant's Exhibit 4.8A. Do you recognize that?

A Yes, this is yet another iteration that was put forward by the redistricting committee chairs.

Q And were you, again, involved in doing data support for this plan?

A Yes.

Q All right. And looking behind it, do you see the page marked Defendant's Exhibit 4.8, and it says Exhibit 8, fourth affidavit of Dan Frey?

A Yes.

Q All right. And the stat pack that is behind that, is that information that you prepared for your fourth affidavit or that was included in your fourth affidavit, I should say?

A Yes, I believe so.

Q I would – would I be correct in assuming that you prepared this to support or to go with the plan that has been entitled – called Rucho-Lewis Congress 2?

[447] A Yes, this looks like our standard report for that plan.

Q All right. And does it follow the same format as – that stat pack follow the same format as the other plans we've looked at that have a 2010 Census data stat pack?

A Yes, yes.

Q All right. And then behind Exhibit 10 – Tab 10, exhibit, Defendant's Exhibit 4.9A, do you recognize that map?

A Yes, basically this would be one more iteration of the plan.

Q And behind that, you'll see Defendant's Exhibit 4.9, and it says Exhibit 9, fourth affidavit of Dan Frey?

A Yes.

Q And is the stat pack behind that information that you had prepared?

A Yes.

Q And does it follow the same format as these previous ones we've looked at that use the 2010 Census?

A Yes, it does.

Q And it would have the same racial and ethnic categories?

A That's right.

Q All right. Now, let me ask you to look behind Tab 11, Defendant's Exhibit 4.10A. Can you identify that?

A This – this is a plan, an alternate plan, that was introduced by – yeah, Stein – representative? Senator?

Q By Senator Stein?

[448] A Senator Stein, right.

Q And was this introduced during the process of considering districting plans, do you recall?

A Yes, this was – yes, a formally introduced plan during the process.

Q And behind it you'll see Defendant's Exhibit 4.10, and it says Exhibit 10, fourth affidavit of Dan Frey?

A Yep.

Q And the stat pack that's behind that, did you prepare it?

A Yes, so that's a – once again, that's the same format, same information.

Q And then last one behind Tab 12, Defendant's Exhibit 4.11A. Can you identify what that map is?

A So that – that is the final enacted plan for 2011.

Q This is the plan that was enacted by the General Assembly?

A Yes.

Q All right. And behind that, Defendant's Exhibit 4.11, do you see where it says Exhibit 11 to the fourth affidavit of Dan Frey?

A Yes.

Q And is the stat pack behind that one that you prepared?

A Yes.

Q And does it also follow the same format?

A It does.

Q And does it have the same racial and ethnic categories as [449] the other ones we've looked at that utilize 2010 Census data?

A That's correct.

Q All right. Thank you. You can put the notebook aside, but I do, I'm afraid, have some more documents. All right. Mr. Frey, again, we'll move through these as quickly as we can. Let me ask you to look first at the first page that's marked Defendant's Exhibit 2.60. Can you identify this document?

A Yes, I recognize this, and I believe this was one of the affidavit –

Q I'm sorry, you'll have to speak up a little bit.

A I believe this is one of the ones that was in one of my affidavits.

Q Did you prepare this chart?

A Yes.

Q And what basically does this chart show?

A Okay. So this is using the 2001 Congressional Plan, but using the 2010 Census data, and so it shows the – for the 1st and 12th districts the – who won the elections in the various years, 2006 through 2010, their race and party.

On the far right, it just shows total population, how they were off from the ideal population, and then the information in the center is based on voting-age population. There's a race breakdown. This race breakdown does single race white and then it has any part black, so either single or multi-race black, Native American and Asian/Pacific Islander, [450] other. Then it has a straight Hispanic percentage, and then it has a non-Hispanic white percentage for each district.

Q All right. And let me ask you to look at the notes under there, and do you see a fourth note that begins with the word "note?"

A Yes.

Q Could you read that one, please.

A "Note that the white race category is without regard to ethnicity, and so includes people who are Hispanic or Latino. White non-Hispanic excludes that portion of the population."

Q All right. Thank you. Now, if you'll look at the next document, which is Defendant's Exhibit 2.61. Can you identify what that document is.

A Okay. So this is a similar format, but this is for the enacted Congressional Plan using 2010 Census data instead of when – since it was a new plan, instead of election winners, it has incumbents over on the left.

Q All right. And does it show – other than the difference between election contest where there's an incumbent, does it show basically the same kind of information as the previous one?

A Yes, yeah.

Q If you'll look at the next one, which is Defendant's Exhibit 2.62.

A Okay. So this is, once again, essentially the same [451] report, but this is for the Congressional Plan that was proposed by the Southern Coalition for Social Justice.

Q All right. If you'll look at the next one, which is Defendant's Exhibit 2.63, is that basically the same kind of –

A Yes, it's the same –

Q – but for the Congressional Fair and Legal?

A Yes.

Q And that was a proposed plan –

A Yeah, that was a formerly introduced plan during the process.

Q All right. Now, let me ask you to look at Defendant's Exhibit 2.64. Can you explain what this one is.

A Okay. So this is a similar report, but instead of voting-age population, it's got voter registration information, and so it goes through and breaks it down for – well, you know, after the election's winners section over here, then it's got Democrats, Republicans, and unaffiliated. And under the Democrats there's a subsection there that breaks out the white and black portions of the Democrats.

Q All right. Now, does this one show any distinction between non-Hispanic whites and Hispanic whites?

A No, it doesn't. The voter registration information, at least our processing of it, that – of that did not have a cross-tabulation that would allow that.

Q All right. So would it be correct to assume that in the [452] categories here where it's identifying white population that that white population includes both Hispanic and non-Hispanic whites?

A Yes.

Q All right. And turning the next page to Defendant's Exhibit 2.65, does that show similar information for Rucho-Lewis Congress 3?

A Yes. And, once again, since this is a new plan that doesn't have election winners, instead it has incumbents, but it's essentially the same layout.

Q And this one – does this one distinguish between Hispanic and non-Hispanic whites?

A No.

Q All right. The next one is Defendant's Exhibit 2.66.

A Yes. So, once again, essentially the same report but for the SCSJ Congressional Plan.

Q All right. And then the next one is Defendant's Exhibit 2.67, and is that essentially the same kind of report but for the Congressional Fair and Legal –

A Yes.

Q – Proposed Plan, all right. The next one is Defendant's Exhibit 2.31. Can you identify what that is.

A Okay. This is a chart that shows – like these numbers are all based on the 2010 Census, and so this looks at the 2001 District 1 versus the 2011 District 1. It looks at how much of [453] the population was common between the two districts, and then it does the same thing again for District 12, and you can see that the population shared with the new district on each side is identical, but since the total populations are different, then the percentages are different.

Q All right. And did you prepare that chart?

A Yes.

Q All right. If you'll look at the next chart, the sticker on it is not blue, but it says Plaintiff's Exhibit 80.

A Yes.

Q Do you know what this chart shows?

A Yes, this is a comparison of the 2001 Congressional Plan against the newly enacted Congressional Plan, and this was part of our preclearance submission, I believe.

Q And did you prepare this chart?

A No, I think this one was prepared by a Research Division.

Q And can you explain what the Research Division is?

A It's a – well, it's a division within the General Assembly. I work for the IT Division. They – the Research Division is primarily attorneys that work with legislators to draft legislation and, you know, look into the issues for them.

Q All right. Do you know, looking at the categories on this one, does it distinguish between single race and total – single race black and total black?

A Yes, it does. For both of them there's single race black [454] and then there is a total black, which would be the same as any part black.

Q All right.

A And this is – I checked the numbers on this, and so this is – the portion on the left, the population is from the 2000 Census, and on the right it's 2010 Census.

Q The next document is one that's stapled together, and it's marked Defendant's Exhibit 23, and let me ask you to turn four pages in, and do you see – if you go four pages in, do you see three pages of charts?

A Yes.

MR. SPEAS: Your Honor, I object to this document. It was not – it was a letter written to the Court in the *Dickson* matter. It's not a part of the evidence in the *Dickson* matter. I don't see how it can have any relevance in this case.

MR. FARR: May I respond, Your Honor?

THE COURT: You may.

MR. FARR: It actually is a part of the *Dickson* record. It was submitted to the Supreme Court. It was listed as an exhibit and there was no objection registered to it. The letter itself is not really what

we're seeking to admit. It's the charts that are attached to the letter.

MR. SPEAS: Then I'd ask the record – the letter be taken away and removed from the exhibit.

[455] MR. FARR: Well, then I'm – this is no different than the argument that was made about our attorney-client privileged letter because this letter was part of the *Dickson* record and there was no – and we objected to the attorney-client privileged document. There was no objection made to this exhibit in this case.

THE COURT: All right. I scanned the letter. I'll talk to the other judges in just a second, but it seems to me to the extent the letter itself talks about, for example, serious matter and assertion is potentially misleading as it fails to distinguish, et cetera, we feel obliged to correct this potential misperception.

I don't see that – how these statistics may have arisen or that there was a problem with the record is really relevant to this proceeding and, quite frankly, not enough information here for me to decide whether it's misleading or not, but to the extent the letter is – at least in part explains how the attached statistics came up, it would seem to me that it's relevant, so I'd say just to keep it shorthand to the extent the letter addresses any complaints about the proceedings that occurred – procedurally the proceedings that occurred in the state Rucho trial, that's not relevant, but to the extent there's information that explains where the charts came from, it probably is.

MR. FARR: Your Honor, honestly, I – we were having [456] a lawyer's debate here on a technical point about whether objections have been raised. Honestly the letter's not important because Mr. Frey is going to explain what the charts mean, and that's really all we're concerned about.

THE COURT: All right. I'll leave it then that we'll – since Mr. Frey is here and testifying, he can explain the charts. To the extent there's information in the letter which might simply show that charts have been disclosed to the other side, then I'll let it in for that; but, otherwise, we won't pay much attention to any disputes about what happened in the state court proceeding.

MR. FARR: That's fine, Your Honor. I think that's appropriate.

THE COURT: All right. You may – who was doing it? You may continue.

MR. PETERS: I was, Your Honor.

THE COURT: Sorry about that.

MR. PETERS: Thank you, Your Honor.

BY MR. PETERS:

Q Let me just ask you to look at the last page, Mr. Frey.

A Okay.

Q Since this is the page related to the Congressional Plans, can you identify what that chart is?

A Okay. So this relates to the 2001 Congressional Plan. It's based on 2000 Census data. It looks at Districts 1 and [457] 12. So this specifically lays out the percentages of non-Hispanic white population for those districts for both all ages and in voting-age population.

Q All right. And did you prepare that chart?

A Yes.

Q In looking up at the top, was this based on the 2000 Census?

A Yes.

Q And then there's a stack of documents that I'm afraid are not stapled together, but they go together, and the first page is marked down at the bottom. There's a sticker that says Exhibit 81 for a deposition of E. Churchill, and then below that it says Plaintiff's Exhibit 69. Do you know who E. Churchill is?

A Yes. She's an – Erika Churchill. She's an attorney in our Research Division.

Q All right. Do you know what – the charts behind this page that says Congressional Races 1992 to 2010, do you know what those charts purport to show?

A Yes, this is one of the documents that's posted on our website, and so it shows basically election – you know, that top part having to do with candidates in the different years and their races –

Q All right.

A – and their party affiliations, and then down below [458] there's a section with census race breakdowns.

Q All right. Do you know if Ms. Churchill prepared these charts?

A I believe so.

Q Have you gone back and looked at the data in these charts and compared them with data in your system?

A Yes. I've looked at specifically the bottom portion having to do with census data, as the top information is not in our system per se.

Q And based on your review of the data in your system in comparing it with what's in these charts, have you been able to determine whether the columns here that show white population do or do not include Hispanic and non-Hispanic whites?

A They – it's like – the total white is simply total white without regard to ethnicity, so it includes Hispanics.

Q It does include Hispanic whites?

A Yes, yes.

MR. PETERS: I don't have any further questions. Thank you, Your Honor.

THE COURT: Cross-examination. MR. SPEAS: Briefly, Your Honor.

CROSS-EXAMINATION

BY MR. SPEAS:

Q Mr. Frey, you have in front of you, I think, a document marked plaintiff's – excuse me, Defendant's Exhibit 126, which [459] is a collection of historical maps, is that correct?

A Oh, okay. Yes.

Q Do you have that in front of you?

A Yes, I do.

Q And you prepared that?

A Yes, we've – yes, we've at least prepared all the contents.

Q Okay. At the request of counsel for the defendants?

A Yes, that's my recollection.

Q Now, you have – Tabs 1, 2, 3, and 4, at least as I understood your testimony, relate to redistricting plans enacted during the 1990s, is that correct?

A That's right.

Q And the information in – for each of those tabs is the information that the General Assembly had available to it in the 1990s when it was enacting these plans?

A That's correct.

Q And this is the information that the General Assembly used in seeking preclearance from the USA Department of Justice for each of these plans?

A The underlying information, yes.

Q Okay. Now, you have in Exhibit 26 I think also information for the plan enacted in 2001, is that correct?

A I'm sorry, say that one more time.

Q You have in Exhibit 26 put together information for the [460] Congressional Plan enacted by the General Assembly in 2001?

A Yeah.

THE COURT: Hold on just a second. I think –

THE WITNESS: Right, okay. In this exhibit, Exhibit 126 –

BY MR. SPEAS:

Q I'm still on 126.

THE COURT: 126.

BY MR. SPEAS:

Q You have Exhibit 126 in front of you.

A Yeah.

Q Exhibit 126 has in it, at one of the tabs, I'm not sure which, or several of the tabs information about the plan enacted in 2001, correct?

A That's correct, yes.

Q Okay. And the information that is there is information available to the General Assembly in 2001 when it enacted the plan, with the exception of the information based on the 2010 Census, is that correct?

A Correct. There are two separate tabs with Congress zero deviation; one is using the 2000 Census data which is what they would have had available to them at the time. It's not necessarily that the information here is all of the information. You know, these are sort of standard top level reports.

[461] Q I understand. My question is, was the 2010 data available to the General Assembly when it enacted the plan in 19 –

A No, certainly not, certainly not.

Q I thought that seemed logical. So when the General Assembly was seeking preclearance for the 2001 plan, it only had the 2000 Census data?

A That's right.

Q Okay. Now, look with me, Mr. Frey, at the second package of materials that Mr. Peters gave you, and I want to ask you some questions about those documents, and the first question I want to ask you is this: Except for the exhibit marked 69, which comes at the end of the package of materials, and which is congressional race results from 1992 to 2010 –

THE COURT: I don't mean to – let me clarify. The P69 is a part of – as I read this stack, the P69 is a part of that defendant's D23. Is that the way it's numbered or is that a standalone exhibit.

MR. PETERS: No, Your Honor. It's a standalone exhibit. It's a Plaintiff's Exhibit 69.

THE COURT: Okay. So the – it doesn't have a sticker, it just has that P69?

MR. PETERS: Right. I think it got marked early on in the process before the stickers –

THE COURT: Yeah, got it. So P69 in addition to – all right. You may continue, Mr. Speas.

[462] MR. SPEAS: Okay. Thank you, Your Honor. BY MR. SPEAS:

Q Let's address P69 first. P69 is the results of congressional races from 1992 to 2010?

A Yep, okay.

Q And this information was available to the General Assembly

in 2011 when it enacted the plan that's being challenged here?

A Yes.

Q And this document sets out the results of every congressional election and Congressional Districts 1 and 12 from 1992 until 2010?

A Yes, that sounds right.

Q And the General Assembly had this information?

A Yes, I'm trying to remember at what date this was compiled based on our – I don't see a date. I'd have to look at the website to see. I think this was posted early on. It's possible this was actually after enactment, but I think it was before.

Q To the best of your memory sitting here today, this information was available to the General Assembly when it enacted the plan we're challenging?

A I believe it was before the date of enactment.

Q And you recall this information was requested by Senator Rucho?

A Like I say, I didn't compile it. I – it – yeah, I think [463] it may have been.

Q Now, with the exception of Plaintiff's Exhibit 69, with regard to the other documents that you were handed by

Mr. Peters, Defendant's Exhibits D2.60, D2.61, D2.62, D2.63, D2.64, D2.65, D2.66, D2.67, and D2.31, none of that information was available to the General Assembly at the time it enacted these plans in this form?

A Well, these – yeah, these reports were created afterwards. That's not me – using the information in the database that we're using.

Q These reports did not exist at the time the General Assembly enacted these plans?

A Yeah, I believe that's true.

Q Okay. Now, was one of your tasks in your role with the General Assembly to put together the database for the plan that's being challenged here?

A Yes.

Q Did Tom Hofeller help you put together that database?

A Tom Hofeller was around as a consultant sort of, so he had – part of meetings and –

Q And he was around as early as January and February of 2011, correct?

A Yes, I believe so.

Q And these plans weren't enacted until July of 2011, were they?

[464] A That's right.

Q And when – do you recall when Senator Rucho first made public a proposed Congressional Plan? Was it July 1, 2011?

A I don't recall the date.

Q The record would reflect the date on which the first Congressional Plan was made public, will it not?

A Yes, certainly, on our – even on our website there are dates with plans.

Q Okay. Now, as a part of the gathering of data, did you gather election results to provide to put in the legislative database?

A Yes.

Q And who made the decision as to which election results would be put in the database?

A That decision was – basically went out. I made a list of available elections and sent it out to the redistricting chairs for them to mark what they would like to have included.

Q And those chairs were Senator Rucho and Representative Lewis?

A Yes.

Q And they made the decision as to which elections to put into the database?

A Yes, ultimately.

Q And Mr. Hofeller helped you put that database together?

A Well, I mean, primarily I put it together myself, but [465] he – you know, he if – he was helpful if you had a question about what would make sense.

Q He advised you in putting that together?

A Yes, provided some advice.

Q And there are, in fact, many election results in the legislature's database, correct?

A There are quite a few. I'd have to look the data – you know, at the layout to count them.

Q For example, are there 11 election results from the 2008 elections in the legislative's database?

A Possibly. It sounds a little high, but possibly. The – on our, you know, once again, our website, that's – the full layout document is posted.

Q But a person could go to the legislature's website and actually count the number of election results set forth in the database that the General Assembly compiled to create this challenged plan, correct?

A Yes.

Q And there's several elections?

A Right. I don't – yeah, there's not just one.

Q It's not just the 2008 Obama election, is it?

A No.

MR. SPEAS: Thank you.

THE COURT: Redirect?

MR. PETERS: No redirect, Your Honor.

[466] THE COURT: All right. You may step down.

(At 3:58 p.m., witness excused.)

THE COURT: Next witness.

MR. FARR: Call Dr. Tom Hofeller.

(Witness sworn by the clerk.)

MR. FARR: Your Honor, could we put our maps back up?

THE COURT: You may.

THOMAS BROOKS HOFELLER,

DEFENDANT'S WITNESS, SWORN AT 3:59 p.m.

DIRECT EXAMINATION

BY MR. FARR:

Q Would you please state your name.

A My name is Thomas Brooks Hofeller.

Q And could you tell us where you reside currently, Mr. Hofeller?

A I reside at 6701 Pointe Vista Circle, Raleigh, North Carolina 92615.

Q And could you tell the Court a little bit about your educational background starting with college.

A I received a BA in political science from what is now Claremont McKenna College in California. It was actually Claremont Men's College when I graduated from it. It's since gone coed. I received a master's from Claremont University Center which was then Claremont Graduate School, and I received a Ph.D from Claremont University Center.

[467] Q And what was your Ph.D in?

A Government.

Q And I've handed you Exhibit 129. Could you identify that for the Court.

A That's my current resume.

Q And Dr. Hofeller, do you know what redistricting is?

A Yes.

Q Have you ever been involved in redistricting?

A About 50 years worth.

Q Can you tell the Court about your experiences in redistricting?

A Well, I've actually started out redistricting in California in 1965 and in the late '70s and then on I was in redistricting cases and operations across the country. I moved to Washington DC in the summer of 1981 and have been involved on the national redistricting scene ever since that move.

Q How much of your professional time has been spent involved with redistricting?

A It's really kind of hard for me to estimate exactly how much time because, particularly in former decades, redistricting is kind of seasonal, and so between redistricting years, I've had various other jobs that I've been involved in. So I can't say that it's been many years worth of redistricting experience over the previous five decades.

Q Have you drawn redistricting plans for state legislatures?

[468] A Yes.

Q And have you drawn state-wide plans for state legislatures?

A Yes.

Q Have you drawn state-wide plans for political parties or private persons?

A Yes.

Q How many types of state – how many state-wide plans do you think you've drawn during the course of your career?

A Well, if you count plans that I've drawn to analyze the political and demographic data that comes out from the census for multiple states to see what the possibilities are for redistricting, I would say those plans are probably in the hundreds.

Q And what types of information do you rely upon to draw redistricting plans?

A There are two different – well, there are actually three different data sets that one uses to draft redistricting plans. One is the census data, which very fortunately is compiled by the US Census Bureau and is released to the general public about – a little bit before a year after census day each decade.

There's a program that the Census Bureau has under public law 94-171 in which the states are allowed to indicate what units of geography they want data to be tabulated for for [469] redistricting purposes, which are called voting districts. Many people call them vote tabulation districts, but the official census name is voting districts. So that's the demographic data which consists of racial and ethnic data.

Sometimes if redistricting goes on beyond a couple of years after the original data release, other information has become available from the Bureau, at least – except for the last census which is from the census long form, which contains some citizenship data which is usually of interest.

The Census Bureau does not provide any election or registration data to the states for redistricting purposes. That has to be done at the state level by state employees or by other organizations, and that data has to be matched to the voting districts so that one gets a unified database for the vote districts if the state has them. A number of states don't participate in that program. That causes further problems.

One of the things that is typically gathered for redistricting are residences of incumbents. Everybody's interested in where the incumbents live, particularly the incumbents actually. So that's a separate very small database that has to be added in.

Q Okay. In drawing redistricting plans, do you – what do you look at in drawing the districts?

A Well, number one is population figures, and the population figures are – come in many different hierarchal levels from [470] the Census Bureau other than just vote tabulation districts. So generally the data is down on census data to the block level, a census block, which is sort of analogous to a city block, but it can be a different type of area.

So sometimes the blocks are divided by railroads or some natural stream or something like that, and sometimes the census block, particularly in rural areas, will constitute several natural blocks with what we would consider blocks. And it builds back up hierarchically up through different geographic hierarchies up to – up through the county level and the state level.

Q Could you – there's been some testimony on this, but could you tell the Court what a vote tabulation district is.

A Every decade since Public Law 94-171 was passed by Congress, the Census Bureau reaches out to the individual states and, to put it simply, says give us the lines by which you would like your data tabulated, specially for redistricting purposes, so those are usually vote tabulation districts.

They're usually the same as precincts but not always because the census has some rules on what kind of a line you can give them, so they'll say this has to be some identifiable on-the-ground feature, or it has to be a city limit line, some jurisdictional boundary.

Q And do you use vote tabulation districts in drawing redistricting plans?

[471] A Where the states actually have them, they're used. Some states, such as my home state of California, they've kind of done a miserable job of – they're kind of in-house state VTD so California is so big that they actually redistrict on census tracks which are much larger.

Q Do you ever look at political data when you're drawing redistricting plans?

A Absolutely.

Q Could you explain why you do that and what type of political data you review.

A Well, redistricting experts operate under the assumption that the best predictor of future voting behavior is past voting behavior. So you can look at a number of electoral races to try and build districts that you think are favorable to the policies of the people who are implementing the map, or if you're not working for somebody who actually is drawing the map, just what you think is there. But many times I've used in redistricting a single race which I've found to be highly correlative to other races because it's simpler

for most people to understand where you're going with it.

Q All right. And when you're looking at the voting results for a particular election, what unit of census geography are you looking at?

A Well, the –

Q What roles – what role does V – do VTDs have in this?

[472] A Well, again VTDs are analogous, for the most part, to precincts, and there's no division of election data down below the precinct level except for purpose of actually loading the data into a system like Maptitude where you have to disaggregate it into blocks so that the system has some political data all the way from the top to the bottom. That's a requirement to make the system run properly. But if you split a precinct, the data for that precinct will be homogeneous proportioned according to the number of usually adults that are on either side of that line.

Q Now, Dr. Hofeller have you ever written any peer-reviewed scholarly articles? Have you written –

A Yes.

Q Could you tell the Court about that.

A Well, I wrote an argument on compactness with Bernie Grofman, et al. which is a very early and kind of seminal argument on compactness.

Q Okay. And do you have any experience in redirecting in North Carolina?

A A lot.

Q Could you tell the Court about that.

A I was a consultant to the legislature in 1980 and testified in the *Gingles* case. I also was involved in the

'90s and 2000 and involved this time, so I have a lot of experience. I testified in *Shaw* and helped with other cases throughout the [473] decades. North Carolina actually makes more redistricting law that most any state is entitled to make, and there are a lot of cases. I'm pretty familiar with Carolina, although sometimes individual names of cities and such are not available to me at my age.

Q And you mentioned you testified in the *Gingles* case. Did you testify as an expert witness in that case?

A I did.

Q And did you testify as an expert witness in the *Shaw* case?

A I did.

Q Have you testified as expert – as an expert witness in other cases?

A In North Carolina?

Q North Carolina or anywhere else.

A Well, about 19 cases, I think. I counted them up this morning before I came to court. I looked over my resume and said where did I actually give court testimony.

Q So are those –

A Not all of them, incidentally, have been congressional or legislative; some of them have county level, city level, other types of districts. It varies.

Q And have you ever been disqualified as an expert in any case that you've testified in?

A No.

Q And has a Court ever found that you have given false [474] testimony in a case you've ever testified in?

A No.

MR. FARR: Your Honor, I'd like to tender Dr. Hofeller as an expert in redistricting, voting behavior and demography.

THE COURT: Redistricting, voting behavior, and what was the last one?

MR. FARR: Map drawing.

THE COURT: Say it one more time.

MR. FARR: Map drawing. I said demography, but I – he's drawn a lot of maps.

THE COURT: All right. There was a – I think there was a motion in limine filed as to Dr. Hofeller, but I'm not sure it was anything –

MR. HAMILTON: We have no objection to Dr. Hofeller testifying as an expert in this case on the proffered points. The motion in limine solely related to his expert report and the legal conclusions contained within it, and that's not before the Court at the moment. So I have no objection to the proffer.

THE COURT: All right. Then we will permit

Dr. Hofeller to testify as an expert in redistricting, cartography and what was the third area?

MR. FARR: Voting behavior.

THE COURT: Voting behavior. All right.

[475] BY MR. FARR:

Q Okay. Now, Dr. –

THE COURT: Hold on just one second.

(Short pause.)

THE COURT: All right. You can continue.

BY MR. FARR:

Q Dr. Hofeller, you've been – the Court's allowed you to give testimony as an expert, but you also participated in redistricting in North Carolina in 2011, did you not?

A I did.

Q Could you tell the Court how you came to be involved in redistricting in North Carolina in 2011.

A Part of it was because people knew me from my past experience in the state. I was working in 2010 at the Republican National Committee as their consultant, and as part of that job we held a conference on redistricting in Washington DC, I believe in April of 2010, as part of our program to try to get the stakeholders ready for the redistricting process.

There are a lot of different facets of the process, and sometimes it's a struggle to get the politicians to get off the current problem of the day and start preparing for this process, particularly in terms of building databases and getting software and getting people trained up. I met legislators from South Carolina, then I was also in touch with your law firm and with you, and so I became involved with [476] redistricting in the state.

As was mentioned previously by Dan Frey when he testified, one of the problems that North Carolina had in preparing for the redistricting is that the Democratic majority in the legislature had not really brought the database up-to-date with some of the latest elections. So I came down for several meetings at the General Assembly and discussed with them how to get these databases up-to-date.

One of the problems is is the precinct lines change over time. You have to adjust the data. They actually did the work, and they got the concepts down pretty

quickly, but we lended some advice on how to put it together.

Q And then were you actually engaged to be involved in drawing redistricting maps in North Carolina?

A Yes.

Q And who were you engaged by?

A I was engaged by you.

Q And who gave you your instructions on how to draw the maps in North Carolina?

A The instructions, as they should always do in the legislative session, came from the legislative leadership. In this case it was the two chairman of the redistricting committees in the two houses, Senator Rucho and Representative Lewis.

Q And what political party were the cochairs from?

[477] A The Republican Party.

Q And had the Republican Party controlled the redistricting process in North Carolina prior to 2011?

A No.

Q Dr. Hofeller, can you see you've got the 2001 and 2011 congressional maps up there with you?

A I do, although I can't actually see both of them.

Q You can't see them at all?

A I can see they're there, but I can't see the whole map.

Q Okay. Well, if at any point you need to walk down and look at them to give your testimony, I think you've got a pointer with you, and you don't need to do

it now, only if you think it would be helpful, but did you have an opinion on whether the policy goals of the 2011 legislature for congressional redistricting were different than the policy goals of prior General Assemblies?

A Absolutely.

Q Well, could you explain that to the Court.

A Well, for the first time I think probably in my lifetime, the Republicans had taken over both houses of the legislature, and since the governor in North Carolina does not have veto authority over redistricting plans, the Republicans were for the first time actually drawing the maps.

Obviously, as is the case in almost all redistrictings, the majority party draws the maps according to [478] their policy goals which are usually quite different from the opposition party's policy goals.

Q Okay. So can you tell the Court what criteria you received from the cochairs to draw the congressional plans?

A The congressional plans specifically?

Q Specifically and then we can go into the 1st and the 12th districts?

A All right. Well, obviously the first criteria is one person, one vote, but that kind of goes without saying because in Congressional redistricting now, the standard is as equal as practicable and has developed to the point where districts have to be within one person or zero persons of the ideal district population which is compiled by dividing the state's population in the census by the number of districts. That was the first one.

Q Is there any other general criteria or policy decision by the cochairs?

A Well, the second policy decision was to draw maps that were more favorable to Republican candidates in the congressional map. The third was to avoid causing problems vis-a-vis the Voting Rights Act. The fourth was to draw the districts in such a way that we might go some way towards avoiding the large variances of the populations of the district as we come up to 2020 and the new census.

Q All right. So the two districts being challenged in this [479] case were Congressional District 1 and Congressional District 12. Could you tell the Court what criteria you were given by the cochairs for Congressional District 1?

A Congressional District 1 was considered by the chairs to be a voting rights district. In my experience, it's always been considered a voting rights district, so it had to be drawn in accordance with the fact that it needed to be passed through on Section 2 and also Section 5 which was in effect at the time the maps were enacted and submitted to the Justice Department. All the other criteria were pretty much the same for the 1st District as the general criteria I mentioned.

The 12th District, if you excuse me, as a result of the two *Cromartie* cases had been treated by the Democrats in its former iterations as a political district after the original couple of tries that they had in the '90s. They came back with a map, and in '97 it was justified as a political map rather than a voting rights or – map, and there was no reason to treat it otherwise. In fact, there was every reason not to treat it otherwise – or to treat it the same way in this redistricting. So my instructions from the two

chairmen were to treat the 12th District exactly as it has been treated by the Democrats in 1997 and 2001 as a political draw.

Q Okay. Now, did the 2001 map and the location of the districts play any role in the 2011 plan? Was there any similarity between the 2001 districts and the 2011 districts?

[480] A Well, they're actually very similar. They were drawn in the same six counties and they ran in the same general direction from Mecklenburg County up to Guilford County with the districts splitting off into Winston-Salem County.

Q Now, you're referring to the 12th District?

A I'm sorry, the 12th District.

Q Yeah. My question is what about the entire Congressional Plan? Did the old districts provide a frame of reference for the new districts?

A Well, they provide a limited frame of reference, but the problem is is that there were some population pressures because of lower population growth in some areas of the state, and greater population growth in other parts of the state, and so the districts would, right off the bat, have to be adjusted for those population differences in order to comply with one person, one vote.

Obviously there were also some other issues which involved the political policies of the General Assembly which, of course, were diametrically opposed in many ways to the political policies of the former General Assembly in 2001.

Q Now, did you receive any instructions regarding the amount of black voting-age population to include in the First Congressional District?

A My understanding was I was to draw that 1st District with a black voting-age population in excess of 50 percent because [481] of the *Strickland* case.

Q And could you give the Court your understanding of what the *Strickland* case meant.

A Well, I don't want to be playing attorney here.

MR. HAMILTON: I'm going to object, Your Honor, at this point. He's not been proffered as an expert in the law, and I don't think it's appropriate for him to testify. He can testify, of course, what his instructions were from the legislators, but having him construe *Strickland*, I think invades the province of the Court.

THE COURT: I think if you rephrase it just to couch it in terms of him explaining – in light of his response, couch it in terms of his explaining what he understood his instructions were.

MR. FARR: Your Honor, if he was familiar with the *Strickland* case, that would have some bearing on his understanding of why he was doing what he was doing. We're not offering him as an expert on legal issues.

JUDGE COGBURN: Is he going to testify that he took *Strickland* and read it as a legal case and then followed the legal reasoning of it, or is he going to say that based on that he followed the instructions of the legislature and what's his answer going to be?

If he said – he said he followed the *Strickland* case. Is he – did he follow it as its legal ruling, or did he [482] get specific instructions of how to follow the *Strickland* case, and he can answer that. If he followed the *Strickland* case, then I think he would have to say what he thought it said, whether it's legally right or legally wrong.

MR. FARR: Yes, sir. That's what – I think the answer is both, so if – we're not offering him as – we're not saying he's right about what the *Strickland* case means. That's for the Court to decide.

THE COURT: Let's clarify what he's doing and then you can go from there. While we're doing that, before we start back, give me just a minute.

(Short pause.)

THE COURT: All right. Let's see where we are.

Mr. Farr, you may continue.

MR. FARR: Okay.

BY MR. FARR:

Q So I'm not asking you for a legal conclusion or a legal explanation, Dr. Hofeller, but I do want to know, have you ever read the *Strickland* case?

A Yes.

Q And what was your understanding of what it said?

JUDGE GREGORY: Isn't that the objection? Is he going to tell us what he understood the legal case said? That's –

THE COURT: Go ahead.

[483] JUDGE GREGORY: It seems to me that's a legal opinion. That's what lawyers do, interpret legal opinions.

MR. FARR: Well, I'm sorry, Your Honor. We're not offering him as an expert on the law, but he read the *Strickland* case and part of – and that informed him about what –

JUDGE GREGORY: Well, he answered your question. You asked for the directions. He said he was

to draw it so it was 50 percent plus. He already answered that question.

MR. FARR: All right, Your Honor, I'll move on, and I apologize. Thank you.

BY MR. FARR:

Q Now, did you receive any instructions about the racial percentage to include in the 12th District?

A I did not.

Q What was your answer?

A I did not. Am I speaking too fast, Your Honors?

THE COURT: No.

THE WITNESS: Okay. BY MR. FARR:

Q Now, let's look at some of the criteria that you have discussed that you were told to follow and, Your Honor, I'm going to hand up his expert reports right now, if that's okay.

THE COURT: Okay.

BY MR. FARR:

[484] Q So Dr. Hofeller, I've handed you Defendant's Exhibit D. 25.8. Could you tell the Court what that is.

A That is a copy of my first expert report which was signed on February 17, 2014.

Q And I've also given you a copy of an exhibit that is marked D, Defendant's 26.1. Could you tell the Court what that is.

A That is a copy of my second expert report in this case, which is dated June 4, 2015.

Q Okay. So could you tell the Court what your understanding was of the criteria you had been given regarding equal population of the districts?

A Again, not to repeat myself here; but, again, the standard for quality of population is the minimum deviation that you can possibly do, because the state's population doesn't divide evenly into – can't be divided into equally by the number of districts. Sometimes some of the districts have to be negative in a state and zero. Sometimes they have to be positive in a state and zero, but we – plus or minus one depending on the state.

Q Okay. Now, could you turn to Exhibit D-26.1 and Map No. 1, please.

MR. HAMILTON: Your Honor, these documents are being offered into evidence so that we can examine the contents of them. Perhaps now, I don't want to prematurely raise an [485] objection, but if we're going to examine the substance, I think they ought to be offered into evidence first, and at that point we would have an objection to certain portions of this.

So, having said that, I would – our motion in limine was to strike certain legal passages from here. I don't object to the admission of the report overall, only would ask that the Court strike and disregard those portions of the report that – in which Dr. Hofeller offers his legal opinion as a nonlawyer about the meaning of certain cases.

THE COURT: All right. Let me get squared away, because I got lost in the – you had just asked him to pull out 26.1 or 126?

MR. FARR: Defendant's 26.1, Map No. 1.

THE COURT: Okay. And your objection is to portions of Dr. Hofeller's report that involved a legal conclusion?

MR. HAMILTON: Correct, Your Honor, in both – both of the exhibits that is on hand right now which is

Exhibit D26.1 and the other exhibit that was just handed up, which is Exhibit D25.8. Those are the two expert reports as to which our motion in limine was addressed because they're kind of scattered throughout, and I'm not trying to be difficult here. That's why I asked in our motion in limine.

THE COURT: Let me say this: At this point in time, I think the comments from the bench make clear that Dr. Hofeller has been qualified as an expert in certain areas, [486] not as a legal expert, and there may be matters contained in the reports that address legal issues such as case interpretation.

At this point in time, let's hear the testimony. We can sort through, I think, whether now or later, what's proper. There's a – as I see it, there's a little tricky issue as to what constituted an instruction, such as comply with *Strickland* to make a black voting-age population greater than 50 percent in CD1, which doesn't involve reading the case. It's just an instruction, and those which may be I read the *Strickland* case, and I conclude X. And until we've heard the testimony, it's kind of hard to sort through –

MR. HAMILTON: Understood, Your Honor, and I think that makes – that makes sense, and there's statements in the – in a report that go far beyond the instruction. And to be clear, we have no objection to Dr. Hofeller talking about the instructions he received from the legislators, whether that was couched in terms of legal advice or not, that's fine.

THE COURT: Let's go ahead and hear it, and we'll sort through it.

MR. HAMILTON: Thank you, Your Honor.

THE COURT: All right.

BY MR. FARR:

Q So Dr. Hofeller, we're on Exhibit D26.1, and there's a color map that's labeled Map No. 1. Do you see that?

[487] A I do.

Q Could you tell the Court what this map is. Did you make this?

A I did.

Q Could you tell the Court what the map is.

A This is a map showing the districts which were enacted in 2001. I believe that was the zero deviation plan. The colors of the districts mean nothing special except that no adjoining district should have the same color as the one adjoining. No district should have the colors – same color if they are adjoining.

This is part of a preliminary analysis that any redistricting expert or any map drawer would make of a state, be it at the Congressional level or the legislative level or any other level, which is to see what the one person, one vote issues will be in the state, not only by individual districts, but by areas of the state, and where – to try and be thinking about how those different population deviations will be corrected in the new plan.

So the importance of this map was to note that, for instance, the three most western districts in the state, 5 and 10, and 11, were all significant negative deviations. Also, of course, District 1 in the north, northeast was a very high deviation. District 6 had a low deviation, and I guess most notably District 4, which is in the Raleigh-Durham/Chapel Hill [488] area had a very high positive deviation as did the 9th

District in Mecklenburg County, which had a positive deviation of 118,000.

The rest of the district deviations were relatively minor, but the problem you have when you're drawing districts is although one district might be right on, it might be pushed by the deviations in the other districts. One of the problems I often encounter in redistricting is every member thinks the district should start at their district, and all the pieces don't fit together with all their wishes, so this is just a standard deviation map.

Q Okay. So just to make sure this is clear, which district, under the 2001 plan, was the most underpopulated?

A District No. 1, 97,563 persons.

Q And what was the most overpopulated district?

A Was District 9 in the positive, 118,878 persons.

Q And what was the second most overpopulated district?

A The 4th District, which was 93,379 over the ideal district size.

Q And can you, looking at this map, or if you need to look at one of the maps we have on the easels, can you recall the counties that were in the 2001 4th District?

A I believe it was Chatham, part of – part of Chatham, part of Wake County, Durham County, and I believe Orange County.

Q All right. Now, did you have any discussions with the [489] cochairs about how to address the underpopulation issue in the 1st Congressional District?

A I'm not sure exactly what you're getting at here. Obviously the district would have to add 97,563 people.

Q Was there any discussion about where the district should be drawn?

A I was just getting to that.

Q Okay.

A Okay. There was a discussion and an instruction to look at initially Wake County as a way to resolve that population underage, but I have to also add that in drawing that district, we also had to resolve two other things; the population pressures caused by the deviations of the other districts and also the political policy goals of the General Assembly as instructed by the two chairmen.

Q Okay. Do you recall the first version of the redrawn 1st District? Was it drawn into Wake County?

A It was.

Q And was it drawn into Wake County in the enacted version?

A It was not.

Q Can you –

A It was drawn into Durham County.

Q Can you tell the Court why that happened.

A Well, my instructions changed, more specifically than anything else, and my understanding of why the instructions [490] were given was that the Congressman from the first – well, let me not say that because I think it was more influenced actually by the policy decisions with regard to the partisan makeup of the districts.

Q Okay. Can you explain that?

A Well, in order to do that, I'd really have to get into kind of a detailed instruction of the general changes that were made in the entire map referencing both maps. Do you want to do that at this point?

Q I think so.

A Okay. In 2001 an extra district was added to North Carolina. They got a plus one in the reapportionment of the US House seats, so there was a 13th seat to be drawn in North Carolina. This seat, the 13th, was drawn as a Democratic seat. It went into – it started out really in Guilford County and took portions of the old '97 12th District and other portions of Guilford County that were highly Democratic areas.

It then went across – well, exited Guilford County through Rockingham County and then went over to Caswell County and another little arm of the district came down into Alamance County into the city of Burlington to pick up strong Democratic areas in Burlington. It then continued through Person County and Granville County and entered into Wake County to also pick Democratic areas in Wake County, although it had to transfer to some areas of Wake County that maybe weren't as strongly [491] Democratic as they might have wanted.

This district was drawn for a Democrat, and just by coincidence the chairman of the redistricting committee in the General Assembly, I believe in the Senate, ran for office in that district, then Congressman Miller.

Q Okay. So how did that change then?

A Okay. The 13th District was moved essentially way to the east and became a much different district in 2011, so it is – it is now, was then and is now,

centered around Southern Granville, Franklin and Wake, and I can't really see that map very well. Can I –

Q Okay.

A May I exit?

THE COURT: You may.

THE WITNESS: Thank you, Your Honor.

THE COURT: Don't you have copies of those two maps you can put up there so he can look at them if he needs to?

MR. FARR: They're in the exhibit, Your Honor, but –

THE WITNESS: The district also – can you hear me? The district also goes into portions of Nash, Edgecombe, Wilson, and Wayne County, so it is really centered around the Wake County Metropolitan area and then out in the rural areas to the east of Wake County. That was one change.

The 6th Congressional District, which before had been centered really down in Guilford County and Alamance County [492] going to the south, was actually relocated into the portions of Guilford and Alamance and Orange and Durham County, which was more favorable to Republicans and took North Granville, Person, Caswell, Rockingham, Stokes, and Surry, so it was rotated up north and to the east.

The 10th District was changed quite a bit. The 11th District was moved up into counties like Mitchell, Avery, Burke and Caldwell, and the 10th was rotated around and also went into most all of Catawba, Lincoln, and Gaston, out of which the 9th was removed and then over into Cleveland,

Rutherford, Polk, and probably most notably took in part of Buncombe County.

The 9th went a little further out of Union County and up into Iredell County which helped the 9th District. So the 5th District kind of had to take the area in between all those districts which was the rest of Forsyth that wasn't in the 12th, Yadkin, Wilkes, Alleghany, Ashe, Watauga, Alexander, Northern Iredell and a part of Rowan and Davidson.

In the eastern part of the county, because of the rearrangements in District 1, the 3rd District came down into Person County but didn't go as far up into – and wrap around the first as it did before.

The 7th actually came up farther north and went up as far as Johnson County. The 8th most notably was withdrawn from – was withdrawn from Mecklenburg County and occupied part [493] of the spaces that the 6th had been in and the 2nd.

A new district was drawn – well, not a new district, the 4th District was actually reworked to take the remaining Democratic areas of Wake County, part of Durham County which was strongly Democratic, part of Orange that was Democratic, and part of Alamance, which was formerly in the 13th, and then down through Chatham and Harnett and took Democratic areas in Cumberland. The second wrapped around the second taking again some areas of the 6th.

So the map – if I may go back, the map was substantially rearranged, and this, of course, had a great influence on how the new 1st and the new 12th were drawn. Does that answer your question?

BY MR. FARR:

Q I think more than answers my question.

A I'm sorry.

Q Dr. Hofeller, I want you to turn to Exhibit 26.1, which is your 6/4/15 report and turn to Map 2.

A Yes.

Q I hope you can read this, but did you make this?

A I did.

Q And can you tell the Court what this is?

A Map No. 2 is the 2001 Congressional district showing the percentage of Obama vote in each of these districts, and the percentages are color coded in accordance with the legend down [494] on the lower right-hand side of the map. Unfortunately, I don't know how to get rid of that locked completed thing in Maptitude yet, even after all this time, so just ignore that.

Q All right, sir. And so – just so the Court understands, if I look at Congressional District 1, that's the 2001 Congressional District? Is that right?

A Yeah, I didn't quite catch the question there.

Q I'm looking at Map 2. I'm looking at Congressional District 1, is that the 19 – or the 2001 version of Congressional District 1?

A Correct.

Q And then what's – there's a number that says 62.8 percent. What is that?

A That's the Obama percent.

Q Okay. And that would be – that percentage would be the same for all the other – it'd be the Obama percentage for all the other Congressional districts listed?

A That's true.

Q Okay. Now, let's turn to Map 3 and tell the Court what that is.

A This is a map, Map 3, of the enacted plan in 2011 with the same shading as the previous map which shows the Obama percentages in the newly created districts; so, for instance, again for District 1, it would be 70.58.

Q Okay. So the Obama vote in – the 2008 Obama vote in the [495] 2011 version of the 1st District represented 70.58 percent of the vote? Is that right?

A That's true.

Q And that's compared to 62.8 percent of the vote for president Obama in the 2001 version of the 1st District?

A That's correct.

Q So how much did that increase?

A I'd estimate roughly 8 percent, a little less.

Q Okay. Now, let's talk about District 12. Could you again repeat to the Court what your instructions were for District 12.

A My instructions from the two chairman were to treat District 12 as a political district and to draw it using political data and to draw it in such a manner that it favorably adjusted all of the surrounding districts. So it was very important in the drawing of 12 as to where the Democratic strength was in District 12 in relationship to the surrounding districts, which were District 6, District 8, District 9 and District 5.

Q Okay. And how did you go about – what census tools did you use to draw District 12?

A I didn't use a census field.

Q What – tell me how you drew it on Maptitude.

A I'm sorry. I had a political thematic. You're – you are – you have a choice of what shading you want to put on [496] units of geography. You can also put a number like population or some percentage, so they call that a thematic display in color always, because it's easier to work with, and the thematic was based on the two-party presidential vote in 2008 Obama versus McCain.

Q Okay. So how did you go about constructing the district then? What did you look at to build the district?

A Well, I looked at those results, but I also looked at what had to be done to accomplish the political goals in the surrounding districts once again. It really wasn't about – totally about the 12th District. It was about what effect it was having on the surrounding districts. So, as an example, if I could give one, if you want one now?

Q Yes, please.

A The amount of people in Forsyth County was reduced from the baseline district, and it was increased in Guilford County, sort of like a rocking chair there, and that's because the 6th District needed to be made better for Republican interests by having more Democratic votes removed from it, whereas the 5th District had a little more strength in it and could take on some additional Democratic areas in – into it in Forsyth County.

Q Okay. So let's turn back to Exhibit 26.1, and I want to look at Map 2 again if we could.

A Okay.

[497] Q And so I want to look at a couple of districts here, Dr. Hofeller, again. This is showing

the Obama vote percentage-wise in the 2001 Congressional Districts?

A It is.

Q And could you tell me what the Obama percentage was in the 2011 12th District?

A 78.06.

Q Okay. I'm seeing 70.28, so maybe your eyes are not seeing that far.

A I'm sorry, I must have misheard you. I thought you said 2011.

Q No, I'm looking at Map 2, which is the 2001 plan, right?

A Okay. That would be 70.28.

Q All right. And if we turn to Map 3, we're looking at the 2001 plan, right?

A I'm sorry, we're looking at what plan?

Q The 2011 plan?

A Yes.

Q And what's the Obama percentage in the 12th District in 2011 plan?

A 78.06.

Q Okay. And how much of an increase is that?

A It's about 7.8.

Q How about if we get the exact number. In that same exhibit, would you turn to Table 3.

[498] A Table 3?

Q Yes.

A Okay.

Q Are you there?

A No, I'm not there yet. I'm looking for the tables in the wrong section of the report.

Q Table 3 is closer towards the front.

A Yep, I realize that now. I'm there.

Q Okay. Tell the Court what Table 3 is.

A Table 3 shows for the 2001 and 2008 – or 2011 plans the black demographics and the Obama/McCain vote for the two districts for the two years.

Q And the – there's a column there that says 18 plus total black population. What does that mean?

A The census would call it 18 plus AP black population, but this is what the General Assembly's staff put in their reports, so it's the percentage of people who indicated their race as single race black or any other race black in – on the census form.

Q Okay. So in the 2001 version of the 12th Congressional District, what was the percentage of that district that was 18 plus total black?

A 2001?

Q Yes.

A 43.77.

[499] Q Okay. And that's the same thing as voting age, total black, right?

A Yes.

Q Okay. And what was the percentage of that same category under the 2011 plan?

A 50.66.

Q So how much did the voting-age total black population increase percentage wise from 2001 to 2011?

A 6.89.

Q All right. Now, let's go to the right and tell the Court what that column is about total two-party vote for president?

A The far right?

Q Yes.

A In 2001 the Obama vote, two-party Obama vote was 70.75 percent. In 2011 it was 78.52 percent for a gain of 7.77 percent.

Q Okay. Now, in this chart you're looking at the two-party vote. What does that mean?

A Yeah. It's strictly the Obama vote and the McCain vote divided by the total of the two votes.

Q Okay. So if we look back to Map 3, you've got on Map 3, Dr. Hofeller, you say the total Obama percentage was 78.06 percent. Do you see that?

A Yes.

Q Can you explain to the Court what the difference is [500] between that figure and the total two-party vote that you listed in Table 3.

A I believe it's because, again, that is the percentage Obama, straight percentage.

Q That includes all the people who were running for president, not just the two-party vote?

A Yes.

Q Okay. All right. Now, let's – let's look at a couple of other districts. I'm looking at Map 2. This is, again,

the percentage of the Obama vote in the 2001 Congressional Plan. Do you see that?

A Yes.

Q What was the percentage of the Obama vote in the 2001 version of Congressional District 13?

A 58.86 percent.

Q And if we turn to Map 3, that's the percentage of the Obama vote for the 2011 Congressional districts?

A Yes, for District 13?

Q Yes. What's the percentage for District 13?

A 44.98.

Q Okay. So how much of a difference was that? Can you estimate or give us –

A I'm just trying to do the math in my head.

Q Okay.

A I'm sorry. I think it's dropping, about 8 percent.

[501] Q Okay. And let's just look at one more district if we could. If we turn to Map 2, again, this is the 2001 Congressional districts, correct?

A All right.

Q What was the Obama percentage for Congressional District 8?

A 52.37.

Q And if we turn to Map 3, what was the percentage for the 2011 version of District 8?

A 41.67.

Q All right. And can you – what – how much difference is that? Talking the 2011 Congressional

District No. 12, did you refer to any racial information in drawing the district?

A In actually drawing the district?

Q Um-hum.

A No.

Q And why did you use the Obama/McCain race?

A Because it was a close race. It was a presidential race. It was a high turnout year and because I felt that it would be indicative of what could happen in the future. I could have used other races. It would have come out pretty much the same anyway because those races correlated very closely, although the percentages might be higher or lower, but the same kind of precincts would have the same behavior, maybe at a higher level, depending on the votes received by the Republicans and [502] the Democrats in those races.

Q Were you here when Dr. Ansolabehere testified about you using one race to construct the 12th District?

A I think I'd rather refer to it as one election contest –

Q One election?

A – for clarity sake, yes.

Q Do you have any response to what he said?

MR. HAMILTON: Objection, Your Honor. I don't have any problem with him testifying, but Dr. Ansolabehere was on the stand for four hours. So maybe we could have a more specific question rather than what's your response to four hours of testimony.

MR. FARR: I'll rephrase that, Your Honor.

THE COURT: All right.

BY MR. FARR:

Q What I meant to ask, Dr. Hofeller, was did you hear him testify – criticize you for using just one election in the Obama election to construct the 12th District?

A I did.

Q And do you have any response to what he said about that?

A I guess my response is this: That in my judgment, with my 50 years of redistricting experience, I have many many times used one race. It isn't that I don't think it's precisely determinative, but I found, once again, that these races track one another at different levels, so I could have used the [503] governor's race in '08 or the Senate race from '10 and the results would have been the same.

But in this case, I decided to use this race because it was, in my view, a good high mark of a – what I call an on-year race, a race with higher voter turnout. If you go to off years, what we call congressional years, you have lower turnout, you have different dynamics, and so we're looking for districts that will hold their political characteristics, to the extent that any districts hold them, over a decade rather than a one or two year cycle.

Q All right. Did you actually look at any other races, Dr. Hofeller?

A We looked at pretty much all of them in the state. Of course, the initial choices of what was put in the database as approved by the chairman looked for races that were fairly competitive; but, of course, every race is an entity unto itself.

Q All right. Dr. Hofeller, I've handed you an exhibit labeled Defendant's Exhibit 124. Could you tell the Court, did you make this.

A I did.

Q Would you tell the Court what it is.

A This looks at the differences between the 2011 enacted plan and the 2001 plan for demographics and for a number of political races, both before and after the redistricting.

[504] MR. HAMILTON: Objection, Your Honor.

THE COURT: Basis?

MR. HAMILTON: The document is not – it's outside the scope of his expert reports. The document has never been identified before. It wasn't identified as a trial exhibit pursuant to Rule 26. It's not out of the *Dickson* reference. This appears to be – I haven't had a chance to consult with counsel. The first time I've seen this document was literally as Dr. Hofeller was taking the stand, so I haven't had a chance to consult with counsel about where this document came from or how long it's been in existence, but this, and there's several others, there's three or four exhibits I haven't had a chance to talk with Dr. Ansolabehere, but I think it appears to be an effort to create a rebuttal after the close of the exchange of expert reports, and so –

THE COURT: Mr. Farr?

MR. FARR: Your Honor, the top chart, I believe, about the 2008 general election, McCain and Obama, I believe that's a compilation of evidence that's already in the record, and the rest of the exhibit, Your Honor, we were only offering for illustrative purposes.

THE COURT: So your Dr. Ansolabehere took a look at it, as I understood it, the McCain/Obama vote also. Is that correct or incorrect? I thought he talked about why he rejected it for several reasons, but I did think he looked at [505] it at some point, but he didn't have the stats with him?

MR. HAMILTON: He did, and that was the subject of his expert report and a subject of Dr. Hofeller's reply. I mean, it had an exchange in the expert reports. That's the whole purpose of exchanging expert reports so that people aren't ambushed at trial with documents, and I don't think it's an answer to say, well, we're only using it for illustrative purposes, so we're simply going to have the doctor walk through the analysis. That's the whole point of Rule 26 and the pretrial disclosures.

THE COURT: I understand. I'm just trying to get squared away on what I think is fair and unfair – fairly and unfairly within the exchange of information between the expert witnesses.

The other thing I will say, and I'll talk – we're going to go ahead and move through and then we'll see. The other thing I am somewhat troubled with, not tremendously, is that there's a little bit of this on the other side, too, in terms of how the boundary ratios were calculated I think is one area where we're going to have the actual calculations within the report, and then it seems to me there were some other discussion of having looked at and rejected information but don't have the actual figures. I may not be remembering correctly, but I thought I remembered some of that type of testimony from Dr. Ansolabehere.

[506] So why don't we do this: Let's just – if it's illustrative purposes, we'll take a look at it. You'll have a chance to talk to your expert over the break, and

then we'll see if we can work through this either tomorrow or later.

MR. FARR: And, Your Honor, I might point out that most of this information is in the map notebook that we mentioned when we opened the case that has got the maps.

THE COURT: I don't have much problem with that. I think the central objection is we've got further explanation of the expert witness's opinion being provided now as opposed to having been included within one of these two reports. That's the core of the objection.

MR. HAMILTON: That's right, Your Honor.

THE COURT: So hang on just a second. We're going to go ahead and take the afternoon – the overnight recess, and we'll let you all kind of work through and make sure of what you're dealing with here. I'm assuming you all are working on that email and we'll have a final answer for us.

MR. FARR: Yes, Your Honor.

THE COURT: All right. Sounds good.

MR. HAMILTON: Thank you, Your Honor.

THE COURT: If there's nothing further this afternoon, we will stand in recess until tomorrow morning at 9:00. Let me – I'll go ahead and stand up, but I will say right now I'll say tentatively to the extent we're going to try [507] to break tomorrow at 5:00, and so closing arguments and the time for that will be somewhat controlled by what time we finish the evidence tomorrow to the extent that helps you plan.

MR. HAMILTON: And, Your Honor, one thing I should just point out –

THE COURT: By the way, that wasn't an invitation to take until four.

MR. HAMILTON: No.

THE COURT: If you get done sooner, that would be great.

MR. HAMILTON: I would agree entirely, Your Honor. We have – we will have a very, very brief rebuttal case, and I can't really describe it yet because it largely depends on what Dr. Hofeller says. It will only consist of a single witness, and it'll be Dr. Ansolabehere coming back for maybe 15 at most 30 minutes of –

THE COURT: All right. With that caution, we'll stand in recess until tomorrow at nine.

(At 5:14 p.m., proceedings adjourned.)

[508] * * * * *

CERTIFICATE

I certify that the foregoing is a correct transcript from the proceedings in the above-entitled matter.

Date: 10/19/2015

/s/ Joseph B. Armstrong

Joseph B. Armstrong, RMR, FCRR
United States Court Reporter
324 W. Market Street
Greensboro, NC 27401

[509] IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

Greensboro, North Carolina
October 15, 2015
9:01 a.m.

Case No. 1:13CV949

DAVID HARRIS, CHRISTINE BOWSER, AND SAMUEL LOVE
Plaintiff,

vs.

PATRICK MCCRORY, IN HIS CAPACITY AS GOVERNOR OF NORTH CAROLINA, NORTH CAROLINA STATE BOARD OF ELECTIONS, AND JOSHUA HOWARD, IN HIS CAPACITY AS CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,
Defendants.

TRANSCRIPT OF BENCH TRIAL VOLUME III OF III HELD BEFORE
THE HON. WILLIAM L. OSTEEN, JR.,
UNITED STATES DISTRICT JUDGE
THE HON. MAX O. COGBURN, JR.,
UNITED STATES DISTRICT JUDGE
THE HON. ROGER L. GREGORY,
UNITED STATES DISTRICT JUDGE

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[511] INDEX

WITNESSES FOR THE DEFENDANT:	PAGE
THOMAS BROOKS HOFELLER	
Direct Examination, Cont'd By Mr. Farr	515
Cross-Examination By Mr. Hamilton	564
Redirect Examination By Mr. Farr	662
REBUTTAL WITNESS FOR THE PLAINTIFF:	
STEPHEN DANIEL ANSOLABEHERE	
Direct Examination By Mr. Hamilton	689
Cross-Examination By Mr. Farr	692
Closing Argument by Mr. Hamilton	700
Closing Argument by Mr. Farr	710

[512] PROCEEDINGS

(At 9:01 a.m., proceedings commenced.)

THE COURT: All right. Good morning. Let me ask, we have a plaintiff's memorandum in support of Exhibit 13.

Mr. Farr, do you all know at this point about – isn't that the email? Do you all know at this point whether or not it's been previously disclosed.

MR. FARR: Yes, Your Honor, and I would like to address that if I could.

THE COURT: Just briefly right now. We'll get on with the evidence, but I just want to know what the status of that part was –

MR. FARR: Very briefly, Your Honor.

THE COURT: – if you know.

MR. FARR: Very briefly, I will say that we have the deposition transcript. I noted an objection to the document being privileged, and we've confirmed that the state rule under 26, I think it must be – I get all these numbers confused, anyway, it's under Rule 26, Your Honor. There's a federal rule under 26 that deals with inadvertent disclosures, and the state rule under 26 is nearly identical, and what the state rule says is once an objection is noted, the other side has an obligation to return the exhibit to the party making the objection, and they are not allowed to disclose the exhibit until there's a ruling on whether or not the privilege is appropriate.

[513] There's another federal rule, I think it's 502(b), which basically says that a waiver in a federal action will not be considered a waiver – a disclosure in a state court action will not be considered a waiver if it would

not be considered a waiver under the Federal Rule 26. So while they may have evidence that this document was filed, they had an obligation to return the document to us once we asserted the privilege, and there should've been a ruling on whether the document was privileged or not before it could be filed.

THE COURT: Okay. All right. So – yes, sir? Briefly.

MR. HAMILTON: Just briefly, Your Honor, and we submitted a short brief on this simply to provide the Court with a factual record so you weren't taking counsel's word for it. The brief was filed not by us, but by defendants in the North Carolina Supreme Court and in this Court.

THE COURT: Let me say this: I can't speak for the other judges, but I haven't had an opportunity to review your brief. I was just handed the brief as we walked in this morning.

MR. HAMILTON: Understood.

THE COURT: So all I want to do at this point, yesterday there was a question about whether it had been filed, and Mr. Farr acknowledged that if it had been disclosed and filed and no objection, then privilege had been waived. As I [514] understand it now, the contention simply is that it was disclosed during the deposition, there was an objection, and no further action has been taken. So the issue before the Court is whether there was an inadvertent disclosure of sufficient – I guess you'd say that nonetheless was insufficient to preclude the Court from finding waivers. So the next step for us is to look at your memo, I think, and see what the history was so we can figure out what's going on.

MR. HAMILTON: I think that's right, Your Honor, and I think the question for the Court is, and I don't

disagree that there was an objection made on the record in the deposition when it was produced as an exhibit by us, because it had been previously produced by counsel, but thereafter counsel slept on his or her rights. I mean, there was no issue raised in the state trial court, no correspondence back and forth give us the document back or anything like that, and then subsequently they, not us, they filed it in several public court filings, where it sits today, and any member of the public can come and look at that document.

THE COURT: I'll take a look at – we'll take a look at your motion and see what we come up with.

MR. HAMILTON: Thank you, Your Honor.

THE COURT: Take that matter under advisement. All right. I have a mystery that I'm going to get resolved this morning before Dr. Hofeller resumes his testimony because this [515] mystery is interfering with my ability to consider the evidence, and that's the correct pronunciation of

Dr. Ansolabehere's name. Doctor, the B-E-H-E-R-E part, is that one syllable like "bear" or is it two syllables like "be-ere." DR. ANSOLABEHERE: "Be-here."

THE COURT: "Be-here." Thank you, sir. I'll be able to rest easily now.

All right. Mr. Farr, are you ready to resume with your evidence?

MR. FARR: Yes, sir.

THE COURT: You may.

MR. FARR: We'll have Dr. Hofeller return to the witness stand.

THE COURT: Dr. Hofeller, let me say that I know you understand this, but any time we go through an overnight recess and a witness returns to the stand, I do remind them that they are still under oath in this proceeding. You may take the witness stand.

THE WITNESS: Thank you, Your Honor. I understand.

THOMAS BROOKS HOFELLER,

DEFENDANT'S WITNESS, PREVIOUSLY SWORN

DIRECT EXAMINATION (Cont'd)

BY MR. FARR:

Q So Dr. Hofeller, I want to follow up with a statement you made yesterday, and this – I'm asking you this question as a [516] fact witness, not as an expert witness. You testified that when you decided to use the Obama/McCain race that it linked up with other races. Do you remember that?

A I do.

Q Can you explain to the Court what you meant by that.

A What I meant by that is that the other races, major races, correlate very strongly with the Obama race. So the presidential race and the gubinatorial races in the Senate –

MR. HAMILTON: Objection, Your Honor, this is not contained in his expert report. There's no disclosure of any analysis about correlation or analysis of other elections, and I object. I'm sorry to object on the very first question this morning. It's not my intention. It's the same issue we had yesterday with the series of exhibits.

THE COURT: Same issue in terms of not disclosing the expert reports?

MR. HAMILTON: Right, the expert – the two expert – the Court will recall this case has been delayed considerably by the *Alabama* case. The original report filed by Dr. Ansolabehere was from December, late December 2013. His reply was filed on January 29, 2014. This Court issued an order in May of this year authorizing the filing of supplemental reports in case something had happened in the last year.

It's an order dated May 7, 2015, saying, "It's [517] further ordered that plaintiffs and defendants shall file any supplemental expert reports by June 1, 2015." Neither side did, and so we object to Dr. Hofeller now talking about correlations with other elections that were never disclosed before. We haven't had an opportunity to respond to that.

I mean, that is – I don't presume to know the Court's thinking, but I assume that's the whole point of this disclosure is so that we don't have this sort of Monday morning surprise and instead we have an orderly process where the experts disclose their opinions and the analysis reaching their opinions, and the other side has an opportunity – a fair opportunity to respond to it. That's obviously not happening here.

THE COURT: All right. Just a moment before we proceed any further.

(Off-the-record discussion.)

THE COURT: All right. Mr. Farr, let me hear from you on what you think your immediate response to this. Is there anything you can point us to that might cover this information?

MR. FARR: Well, Your Honor, the Court might have a better memory of this than I have, but I recall

Dr. Ansolabehere testifying about correlations he made to other elections, and I don't recall any of those – any of that testimony being in his report. He was testifying as an expert [518] witness.

Dr. Hofeller, in this part of his testimony, is testifying as the map drawer, so this really is not part of his expert report. It's part of his memory of the facts of what went into drawing the maps, and in any case, assuming he had some obligation to disclose this in an expert report, which we don't think he did, Dr. Ansolabehere did not disclose in his reports, as far as I understand them, and I stand to be corrected, that he had done correlations on other races.

So I think that the door was open on that issue, even from an expert witness perspective, but that's not really what he's testifying on here. He's testifying as a fact witness about how he drew the maps. And they had a chance to depose him and they had a chance to ask him all the questions that they wanted to ask him about what information he relied upon or what things he looked at or did when he was drawing the maps.

THE COURT: Let's see.

MR. HAMILTON: Your Honor, may I respond?

THE COURT: Give me just a minute. I want to sort through. So the – we have from Dr. Hofeller a second expert report and an expert report. Those are the two reports from Dr. Hofeller?

MR. FARR: Yes, Your Honor.

THE COURT: Is there anything in those – I mean, I think from the analysis presented, I don't think there's any [519] surprise that he relied on the Obama vote election results as set forth in Table 3. Is there anything you can point us to in the reports that would suggest how he did that specifically with reference to

I think it's D124 – is that it? Which one were we looking at yesterday when we stopped? Yeah, D124 which has got the '08, '10, and '12 general election returns. Do you understand my question?

MR. FARR: Well – yes, Your Honor. I think it's a little bit of a different issue. The Exhibit D124 is actually reporting election results. Dr. Hofeller would testify that he did a correlation while he was drawing the maps of other high profile state-wide elections to validate his view that the Obama election would be an appropriate election used to draw the maps. So that's a little bit of a different question.

He did not disclose in his expert reports that while he was drawing the map he performed those correlations, but that part of his testimony is what he did in drawing the maps, and the plaintiffs had every opportunity to depose him. They deposed him twice, in fact, and they could have asked him, for example, what did you do to validate your decision to use the Obama election, and they did not do that as far as I know. So this, again, is a factual issue, not an expert issue.

And again, Your Honor, he has testified already that he took steps to prove that the Obama election lined up with other state-wide reports. That's already in evidence. This is [520] just explaining what he did to reach that conclusion.

THE COURT: Mr. Hamilton?

MR. HAMILTON: Well, I've got several responses to that. First of all –

THE COURT: Just make them brief. I'm trying to figure out where we are at this point.

MR. HAMILTON: Sure. First, Dr. Ansolabehere certainly did discuss correlations. It was in his expert report dated January 29, 2014, a year and a half ago.

It – specifically paragraph 31, and he gives the exact correlation to the Obama vote, of course, but also the governor's race in 2008 at .90 and the Senate race in 2008. Those are the three races that we've been talking about. So this isn't – this is – no parallel here. It was disclosed.

Second, in Dr. Hofeller's deposition transcript, he was actually asked:

"Did you use the Obama 2008 election results in drawing Congressional 1?

Answer, to some extent.

Question, did you use any other election results in drawing Congressional 1?

Answer, there were none others on the screen."

So he was asked. He didn't answer that question and say, oh, yeah I did the correlations for these other races. This – this is – this is new expert testimony.

[521] And then the last point I'll make is we're not operating on a clean slate. This Court, of course, set out its own disclosure rules, but Rule 26 –

THE COURT: I'm familiar with the disclosure rules, Mr. Farr, in terms of none others – no others on the screen, how to interpret that response.

MR. FARR: Well, first of all, Your Honor, let me apologize to counsel and the Court about my incorrect statement that Dr. Ansolabehere did not include that in his report. I deeply apologize for that.

If you look at the question, the question was what were you looking at on the screen when he was drawing the map. That's different – that's a different question than did you do anything else to validate your decision to use the Obama plan; and, at best, they can use that question to impeach his testimony. But,

again, this is not expert testimony he's giving here. This is his recollection of what he looked at and what he did to validate the Obama race.

THE COURT: All right. Let me say this: I'm just going to – I'm speaking for myself. I want to talk to the other judges in just a second, but this is a problem we run into sometimes when a witness is both a fact expert and a – a fact witness and an expert witness, and dividing the line as to what is factual testimony as opposed to expert witness testimony can be kind of tricky.

[522] Confronted with this in the past, I've actually had a witness take the box, testify as a fact witness, come down and then come back and offer the opinions as an expert. I understand that doesn't make any sense here, but it's a knotty little issue sometimes.

So at this point I think we're going to have to in addition to considering the reports, and take a look at the reports, we're going to have to see at least parts of that deposition testimony if we're going to be called upon to make some finding as to whether or not the response – I don't mean to suggest it was a false response, but whether or not the response was sufficient to require the evidence be excluded or whether the response should have been – or whether the response should have been followed up with more pointed questions. That's a difficult issue. Let me talk to these judges.

MR. HAMILTON: Your Honor?

THE COURT: Yes, sir.

MR. HAMILTON: May I – there's an additional passage.

(Off-the-record discussion.)

MR. HAMILTON: Thank you, Your Honor. I failed to draw to the Court's attention I wasn't actually at the deposition, so – but it's on the same page, page 22 of the September 9, 2015, deposition.

[523] "Question, the only election results you utilized in drawing Congressional 12 were the 2008 Obama election results?

Answer, that's correct."

So there was a followup question. It was specifically designed to get at this information.

THE COURT: Well, still, I think we have to look at it in context because those may have been the ones he used, but there is an additional question of did you look at anything else and reject it? Should you have asked that in light of the reports? That's the question. Let me talk to these judges just a moment.

(Off-the-record discussion.)

THE COURT: All right. We're going to take the evidence subject to the objection. At this point in time, I'm – we're just taking the matter under advisement. I would like to get – you'll have to make a call on whether or not it's a lengthy portion of the deposition, enough for me to make a determination as to what the context of those questions were or whether you just want to do the whole thing. I don't know the answer to that, but at some point I'm probably going to want to take a look at that, but I am concerned about the fact that this didn't show up in the expert report, at least sufficiently to, but we'll see where we get.

MR. HAMILTON: Thank you, Your Honor. I appreciate that, and at the break we'll hand up the copies of the [524] deposition which I have with me here in court. May I have a continuing objection, so I don't have to keep jumping up.

THE COURT: Oh, yeah, we'll note –

MR. HAMILTON: Thank you.

THE COURT: To make it clear for the record, the continuing objection relates to Dr. Hofeller's opinion or his explanation based on charts or other as to why – A, why he rejected elections other than the Obama 2008 race as the basis for map drawing and his opinions as rendered in this case as further explained by the chart, this Defendant's Exhibit 124.

MR. HAMILTON: Thank you so much, Your Honor.

THE COURT: All right. You may continue, Mr. Farr.

MR. FARR: Thank you, Your Honor.

BY MR. FARR:

Q So Dr. Hofeller, starting up again. Yesterday you testified that you performed an analysis showing that the Obama race linked up with other races as far as revealing Democratic voting strength?

A Yes.

Q And can you tell the Court what you did.

A Well, there are actually two issues involved here. The first issue is when the database was being prepared, there was a question about which election contests should go into the database. There were a lot more election contests that were available to be put into the state's database, and I was asked [525] my opinion, as were many other people, and one of the things I did was to look at how these different elections track one another.

The other thing I might add, too, is that I didn't draw this plan in a vacuum as far as the data was concerned. First of all, I've drawn numerous plans in

the state of North Carolina over decades. I drew the State Senate districts and the State House districts, and I know from that experience that the underlying political nature of the precincts in the state does not change no matter what race you use to analyze it.

The only way the underlying political demographics, if you could use that term, change in a precinct is if the precinct is changed in the nature of the people that are living in the precinct. So once a precinct is found to be a strong Democratic precinct, it's probably going to act as a strong Democratic precinct in every subsequent election. The same would be true for Republican precincts.

So if you used a conglomeration of elections, my experience is you'd come up with the same – the same result. You may find a little higher score for the Democrats overall in one election because the candidate did better, or you might find a lower one, but the general ranking of the precincts as to how Republican or how Democratic they are is simply not going to change.

Q All right. Now, and to clarify again, when you were [526] drawing the map, actually drawing the 12th District, what race did you look at? What election contest did you look at?

A On the screen when I was drawing the map was the Obama/McCain race shaded in accordance with the two-party vote, which excluded the minor party candidates, and that was the sole thematic display or numeric display on the screen except for one other thing, and that was the population of the precinct because of one person, one vote. And if, in those few instances where the precinct was broken down because of one person, one vote or some other factor,

you also have displayed the populations of the individual box.

Q Okay. Now, Dr. Hofeller, could you – there's a white notebook up there that has Dr. Ansolabehere's reports.

THE COURT: All right. Just to be clear, we're moving off of the objection to material at this point?

MR. FARR: Yes, sir, Your Honor. I'm done with that.

THE COURT: All right.

MR. HAMILTON: Thank you, Your Honor.

BY MR. FARR:

Q Could you turn to Plaintiff's Exhibit 17 in that notebook, which is Dr. Ansolabehere's report of I think December 23, 2013? And I want you to turn to Table 1 which is on page 22. Are you there?

A Yes.

Q Now, Dr. Ansolabehere has got two different compactness [527] tests listed on this table. I don't want to ask you about the Reock test, okay. I want to ask you about the test that he describes as ratio of area to perimeter of district. Do you see that?

A I do.

Q Do you have any opinions about this test as it's reflected in this chart?

A I do.

Q Would you explain them to the Court?

A Yes. As I thought I heard yesterday, and as I read in Dr. Ansolabehere's testimony, that this is a ratio of the perimeter miles of the district to the square miles of the district, which means in order to get the test result you have to divide the perimeter miles into

the square miles, and it will yield actually a smaller amount in square miles.

The problem that I have with this page is that the results for both the 2001-2011, which is the 2001 enacted plan, zero deviation, and the Rucho-Lewis, add up to more than the square miles of the state's land area in square miles. There are 53,000 square miles approximately in the state, and if you add up these numbers, they come out much higher. If you've divided the perimeter miles into the square miles, it should be much lower, and actually what it turns out to be are numbers like 6.2 or 4.5 or something like that. So I simply took another look at this, and I said, this doesn't make sense to [528] me. I have no quarrel whatsoever with his Reock scores.

Q Thank you, Dr. Hofeller. That's all the questions I have on that.

You have in front of you Defendant's Exhibit 124, which we started talking about yesterday.

THE COURT: I got it. This is part of the objected to material?

MR. HAMILTON: Thank you, Your Honor. You took the words right out of my mouth.

BY MR. FARR:

Q All right. Dr. Hofeller, can you tell the Court, did you prepare this?

A I'm sorry, it's D124?

Q Yes.

A Yes.

Q And could you tell the Court what this is.

A This is a comparison of the change in black voting-age population, adult voting-age population,

which we call black VAP and total black VAP, which is also called by the Census Bureau plus 18 any part black voting-age population, which is a longer title – probably that's why this is often used – between the 2011 enacted plan and the 2001 enacted plan, and you can see the differences on the third line.

This also compares a number of percentages for – well, for several elections over time in the new and old plan. [529] These figures, incidentally, are in another – another exhibit that's already in the record here, and what it shows is that when the 2011 plan was redrawn from the 2001 plan, the African-American demographics went up at a lower rate than the gain in the Democrats' election contest demographics.

Q All right. Dr. Hofeller, how did you create this exhibit?

A Specifically?

Q Yeah, what did you – how did you create it?

A I actually looked at – at the time I created it, I looked at the figures in Maptitude.

Q And what were the figures in Maptitude that you were using and where did they come from?

A They came from the North Carolina redistricting database which was done by the IT group in the state legislature.

Q Okay. And I want to make sure that the Court understands one point. Do you have your first report which is Defendant's Exhibit D-26.1? It should be up there.

A That would be my second expert report?

Q The second report, yes.

A Okay. Yes, I do.

Q Could you turn to Map 3. And this is the map we went over yesterday that reported the percentage of the Obama vote in the 2003 Congressional districts. Do you remember that?

A I'm sorry?

Q Do you remember going over this map yesterday?

[530] A Yes, we went over this map in conjunction with Map 2. Are we on Map 2 or Map 3?

Q Map 3.

A Okay.

Q And what I want you to explain to the Court, I'm looking at Map 3, and you're reporting that the Obama vote in the 2011 1st District was 70.58 percent, and on Exhibit 124 you're reporting it slightly higher at 70.93 percent. Could you explain that – why that's different.

A Again, it's two-party vote, and straight –

Q Which one is a two-party vote?

A Well, they're minority candidates that get –

Q No, no, which exhibit – is Map 3 the two-party vote or is Exhibit 124 the two-party vote?

A I'm sorry, I have to look at –

Q Okay.

A Exhibit 124 is definitely two-party vote, yes.

Q And so could you explain to the Court why the Obama percentage is higher – slightly higher in Exhibit 124?

A Well, that's if you use two-party votes, the percentages for both candidates will go up.

Q And what's not included in the two-party vote?

A Third parties.

Q Okay. That's all I have on that, Your Honor.

A Could I add something to that?

[531] MR. HAMILTON: Well, we would object, Your Honor. The normal process is a question and then an answer.

THE COURT: Yeah. Is further explanation necessary to respond to the question?

THE WITNESS: I just wanted to add, Your Honor, that the two –

THE COURT: All right. Answer my question first.
THE WITNESS: I think it's –

THE COURT: Is what you want to add necessary to your explanation?

THE WITNESS: I feel it is, Your Honor.

THE COURT: You can explain your answer. We won't cut you off from that.

THE WITNESS: Thank you, Your Honor. The scores I used were identical, the data I used were identical for both maps, so it shows the difference between the maps and the importance of these two exhibits. Map 2 and Map 3 is to show how the partisan nature of the 13 districts changed between the two plans.

THE COURT: All right. Next question, Mr. Farr.

MR. FARR: Yes, Your Honor. I'm going to hand an exhibit up to the witness, Your Honor.

THE COURT: All right. Mr. Hamilton, to be – while he's doing that, to be clear, on Defendant's Exhibit 124, with respect to the testified to material, I'm assuming, I'm trying [532] to clarify, in that first

spreadsheet at the top, with respect to the Congressional Plan, the 2010 Census, and the census information and the 2008 general election returns as relate to the Obama vote and the Obama percentage – or maybe the whole chart. Is there an objection to that information?

MR. HAMILTON: Well, yes, is the direct answer. The two-party vote explanation here, there's nothing in his expert reports about that at all. I mean, he didn't discuss that in his deposition, so that part of that chart. The data –

THE COURT: All right. Hold on just a second. Let me clarify. There would also be an objection under the Congressional Plan to the – at least the Romney vote and the two-party vote and the other information in the two charts below.

MR. HAMILTON: Correct, the two charts below, absolutely.

THE COURT: Okay. All right. That's enough for now. You may continue, Mr. Farr.

MR. FARR: All right.

BY MR. FARR:

Q Dr. Hofeller, I've handed you Defendant's Exhibit 115. Do you have that in front of you?

A Yes, I do.

Q And is this something you prepared?

A I did.

[533] Q And could you tell the Court what this is.

A This is essentially the top table in the Exhibit D124 and has the same figures in it that that exhibit did, which is a comparison of the increase in census demographics between the 2001 enacted plan and the

2011 enacted plan and the same increase for the Obama percentage in between the plans.

So what it says is while the – for example, while the total black VAP went up 4.02 percentage points, the Obama percent went up 7.85 percentage points.

Q Okay. And if we went back to Maps 2 and 3 in your second report, I think we'd find that the increase in the Obama percentage is slightly higher. Can you explain to the Court why that's so.

A I haven't done the math in my head, but it's really a similar increase.

Q But is this – is this the two-party analysis again in this exhibit?

A Yes, that's – that's what the exhibit states.

Q Okay. That's all I have on that, Your Honor.

THE COURT: All right.

BY MR. FARR:

Q Now, Dr. Hofeller, I want you to turn to your second report which is Exhibit 26.1.

THE COURT: Again, to clarify for the record, we're moving off the objected to material now?

[534] MR. FARR: Yes, sir, Your Honor, and I didn't – I didn't hear an objection to the exhibit we just –

THE COURT: All of the objection is related to the continuing exhibit, so we'll figure out how it all fits together. You can continue.

MR. FARR: I would just point out, Your Honor, the last exhibit that Dr. Hofeller testified to was on our exhibit list and was not objected to.

THE COURT: Okay.

MR. HAMILTON: Just for the record, that's Exhibit D115.

THE COURT: So no objection to 115?

MR. HAMILTON: We have no objection to 115.

THE COURT: Okay. Thank you. All right.

BY MR. FARR:

Q So Dr. Hofeller, do you have your pointer with you up there?

A Yes, I do.

Q Okay. If you decide it's helpful to use that, you may.

That's going to be up to you, but I want to turn to – I want to ask you about District 12, how to figure in Greensboro under the '97 Plan, the 2001 Plan and the 2011 Plan. Okay. So could you turn, please, to Map 4 in Exhibit 26.1 and tell the Court what that is.

A Map 4?

[535] Q Yes, sir.

A Map 4 is an enlargement of the central portion of the state showing the boundaries of the 12 Congressional Districts enacted in 1997.

Q And what color on that map is the '97 12th Congressional District?

A It's blue.

Q And could you, just for the record, state what counties it was located in.

A It starts out in Mecklenburg County in the south, continues through a corridor in Iredell County, heads east over into Rowan County and then northeast through Davidson County, and then it

branches off taking a portion of Forsyth County and Guilford, so it's six counties.

Q Okay. And now turn to Map 5, and could you tell the Court what that is.

A Map 5 is an enlargement of the central portion of the state again showing the boundaries of the 13 – now 13 districts which were drawn in 2001 as the enacted 2001 map.

Q And so what counties are – are – is the 12th District located in under the 2001 Plan?

A Once again, the 12th District in blue starts out in Mecklenburg County, and instead of going through Iredell County, it goes through Cabarrus County into Rowan County and up through Davidson County and then again branches off into [536] Forsyth County and Guilford County.

Q Now, did the 2001 Plan have all the same areas of Guilford County as the '97 Plan?

A No.

Q And how did that change?

A Well, the strong Democratic areas of Guilford County were split in this map and part of them were put into the 13th District. I might add through a noncontiguous, what would be considered now a noncontiguous pathway, the 13th coming down into Guilford County and bisecting the 6th district at a single point of contiguity. So strength was essentially borrowed, if you might say, from the 20 – the 1997 map to help form the new 13th District.

Q When you say "strength," what do you mean?

A Democratic voting strength.

Q Okay.

A Precincts that had strong Democratic voting characteristics.

Q And what happened to them?

A They went into the 13th.

Q Okay. All right. Turn to Map 6. Could you tell the Court what that is.

A This is a map, again, of the central portion of the state showing the 13 districts in the enacted 2011 map.

Q And what color's the 12th District?

[537] A The 12th District is now red. The computer does the coloring to make sure that no adjacent districts have the same color in this.

Q All right. And what counties was the 2011 Congressional District included in?

A It's the same counties that it was included in in the 2001 enacted plan. Do you want me to go through them?

Q We've done that, so I think that will be sufficient. And what changes were made in Guilford County in the 2011 plan as compared to the 2001 Plan?

A The 2011 – I'm sorry, as compared to the 2001 Plan, the part of the 2011 map in Guilford County has portions of the former 1997 12th District in Guilford County added into it, so it's more modeled after that, although there are some differences.

Q And is the 13th District in the 2011 plan located in Guilford County?

A No. It's located I guess the nearest it comes to Guilford County sort of a tie between Durham County and Wake County, but it's nowhere near Guilford County on the new map.

Q All right. Could you explain to the Court what Map 7 is.

A Map 7 is a map of the 2001 enacted plan's 13th Congressional District colored in green and also demonstrates the boundary of the 12th District in red.

Q And that's the 12th District in Greensboro, in Guilford [538] County?

A A portion in Guilford County, yes.

Q Okay. And could you explain to the Court what map No. 8 is.

A Map No. 8 shows the – essentially the dividing up, the reconfiguration of the 13th and other districts in the 2000 – from the 2001 Plan so all of the colored areas on the map were in the 13th District as it was constituted in the 2001 Plan –

Q All right. And so –

A – and it shows.

Q Go ahead.

A And it shows where they ended up in the 2011 map.

Q And can you tell the Court what the colors represent for the various districts.

A Yes. The portion of the old 13th that is in the new 13th is in yellow, and it's located in Wake County and Granville County. The portion of the old or the 2001 13th that is now in the 6th in the present map, the 2011 map is colored blue, and it's in Northern Granville, Person, Caswell, Rockingham and Guilford County.

Q What does the green represent?

A The portion that's shaded green is the portion of the 2001 13th that was added to the 2011 4th Congressional District.

Q And then what's the red or pink portion in Guilford County?

[539] A That's the portion of the 2001 13th which was added to the 2011 12th District.

Q All right.

A There's one more.

Q Okay.

A Unfortunately, it's too small to see. There's just a very small portion in – in the – in Wake County that has the symbol N2 on it, which actually went into the new 2nd District.

Q All right. Thank you. Now, moving to Map 9, could you tell the Court what that is.

A Map 9 – nine, I'm sorry, is a side-by-side view of the 1997 enacted 12th, the 2001 enacted 12th, and the 2011 enacted 12th shaded in red showing the counties and the shape of the district.

Q All right. Thank you. Could you now turn to Map 10 and tell the Court what this is.

A Map 10 is a comparison of the territories in the 2001 and 2011 12th Congressional Districts, and it essentially demonstrates the movement of the 12th District between the two maps. So the green portion -- the shaded green portion of the map is what Dr. Ansolabehere would call the corollary, and I agree with that. It was the area that was in both the new and the old 12th.

The red area, the red area on the map that's shaded shows the portion of the 2001 12th that was not found

in the [540] new 2011, so those were the areas that were removed from the 12th. And the blue areas show – the blue shading shows those areas which were added to the new 12th that weren't in the old 12th. One notable thing about this map is – that I feel is important is to note the movement of the corridor that runs between Forsyth, Guilford County and Mecklenburg. It was moved both to the southeast and also was smaller, and that's borne out by their exhibits that there's less population in that corridor. That was part of the effort, successful effort, I might add, to balance the populations of the districts all the way around the map.

Q All right. And now let's turn to Map 11. Could you tell the Court what that is.

A Map 11 is similar to Map 9 in that it shows the 1997, the 2001, and the 2011 enacted maps, again shaded in red, but shows more detail in Guilford County.

Q All right. And then if we look at Maps 12, 13 and 14, are they just larger versions of each of the maps that are on Map 11?

A Map 12 is just a more detailed view, a little better rendition of the VTD lines for the 1997 12th map; 13 is the same thing for the 2001 12th, and Map 14 is for the 2011 portion.

Q Dr. Hofeller, can you explain to the Court how these three versions of the 12th District treated the strongly Democratic [541] areas that you talked about that exist up in the northeastern part of the Guilford County?

A Well, it would be easier perhaps if the politics were on the map, but essentially the Map 14 shows that the 2011 map is a little more – I think

significantly more aligned with the '97 map than it is with the 2001 map, particularly in Greensboro.

Q Okay. And then if you turn to map 15, what does that show?

A That is again a more detailed map of the northeast corner of Guilford County, actually central and northeast corner, showing how the 2001 13th dovetailed into the 2001 12th in the Greensboro area.

Q Okay. And so what are the green sections on Map 15?

A The green sections shaded green is the 2001 13th, and the red section is the 2001 12th.

Q So if we look at these maps, is it fair to say that the portions of the 2001 13th District were put back into the 2011 12th District in northern – northeastern Guilford County?

A I think what I'd say is that the – when the 2011 map was drawn, particularly in Greensboro, the alignment was more in line with the '97 map than it was with the 2001 map, and perhaps the main thing about that was the 13th District, which was moved clear over to Wake County, was no longer on the map. The other district which was now in Guilford County was the [542] 6th District, which is a Republican district, and in order to make that district more Republican, or actually keep it Republican, the strong Democratic areas of Greensboro had to be removed. So the portions of the 13th that were – I'm sorry, portions of Greensboro that were in the 13th in the 2001 Plan were moved to the 12th.

Q All right. Thank you. Now, Dr. Hofeller, I want to ask you about Dr. Ansolabehere's envelope theory. Do you have an opinion on that?

A Yes.

Q Would you tell the Court what that is.

A Well, I think right off, my first impression when I saw the envelope theory was I had never heard that name before so it was a brand-new name to me, and I think I stated that.

The second thing that I felt when I saw it was that if you build a minority district in a group of counties and the part – only part of some of the counties are in the minority district, that it's completely logical that the portions that are in the counties, of the counties that are in the minority district, which in this case would be District 1, would have a much higher number of minority residents or voters – actually residents – in them than the portion outside the district, and that it was, I guess, a very fancy way of stating the obvious, and I think the same would be true in the case of the 12th.

But the other thing that – about the envelope is the [543] nature of the envelope in that Dr. Ansolabehere used the same envelope to look at the 2011 map and make his envelope analysis that he did for the '01 map, even though the envelopes were actually different, and that really biases the figures, particularly of what's outside the envelope, but it would bias all the percentages.

Q All right. Let's explore that a little bit. Let's – first of all, do you have Dr. Ansolabehere's second report which is Exhibit 18? It's in that white notebook.

A Exhibit 18?

Q Yes.

A Yes.

Q Okay. Would you turn to Table 2, which is the second to last page. Are you there?

A I'm sorry, I was on the wrong – yes, Table 2.

Q And so in Table 2 Dr. Ansolabehere lists the voting-age population and registered voters for both the city of Durham and the county of Durham, does he not?

A Yes.

Q Now, Dr. Hofeller, if you're familiar with all the counties that were included in both the 2001 1st Congressional District and the 2011 1st Congressional District, you're familiar with the demographics of those counties, are you not?

A Yes, I'd say I am, yes.

Q And all the counties that were in either the 2011 or the [544] 2001 1st District, which county do you think has the highest population?

A Oh, without a doubt it would be Durham County.

Q And which county would have the highest population of African-Americans as far as like total numbers?

A Again, I can't state it categorically because I'd have to have the numbers in front of me, but from my knowledge I would say it would be Durham County.

Q All right. So now let's turn back to Dr. Ansolabehere's first report which is Plaintiff's Exhibit 17.

A Yes.

Q And Table 7 and 8 are looking at the envelope for the 2001 and the 2012 – or 2011 12th District, are they not?

A Seven and eight are an analysis comparing the envelope to the 12th – the new 12th Congressional District.

Q Right.

A Okay. The 12th Congressional District.

Q And the 12th Congressional District in the 2001 Plan is in the same county as the 2012 – or 2011 12th District, correct?

A Yes.

Q And so they're both in the same counties and the total population in those counties, under the 2000 Census, would be the same for both the 2001 12th District and the 2012 District?

A Yes, it's like comparing apples to apples.

Q All right. Now, let's go to Tables 5 and 6. So these two [545] tables are purporting to compare the envelope for the 2001 1st District and the 2012 1st District, correct?

A That's correct.

Q And if you look at Table 5 and Table 6 under the column registered voters in group in the envelope, are those numbers the same?

A Yes.

Q Now, was the 1st Congressional District in 2001 in the same counties as the 2011 1st Congressional District?

A No.

Q And was Durham in the 2001 1st Congressional District?

A No.

Q But you heard Dr. Ansolabehere's testimony, and he included Durham County in the envelope that was used to analyze both the first and – or the 2001 1st and the 2011 1st District, correct?

A Yes.

Q Okay. Dr. Ansolabehere didn't look at the envelope that was established by the counties that were actually included in the 20011st Congressional District?

A Okay. I'm sorry, could you ask that again? I'm trying to –

Q Did Dr. Ansolabehere establish an envelope under his envelope theory for the 2001 1st Congressional District based only on the counties that were actually in the 1st [546] Congressional District in 2001?

A No.

Q Now, he didn't disclose in his report, did he, that his envelope for the 2001 1st Congressional District included Durham County, did he?

A Not that I remember.

Q Okay. So including Durham County in the envelope he used to analyze the 1st Congressional District, would you agree that that would add a lot of black population into the envelope he was using to analyze the 2001 1st Congressional District that actually was not in the district?

A Well, actually it would add both black and white population to the area that was outside of the district, because none of Durham County was in the district, so it yields a result that is biased.

Q So let's explain to the Court, by adding Durham County to the envelope he used to analyze the 1st

District, what impact did that have on both the number and percentage of black population that Dr. Ansolabehere said was outside of the envelope?

A Of course, the number would be changed greatly. The percentages might be less changed depending on how close the population of Durham is to the median there of the district, but it definitely would bias the results.

Of course, another problem with comparing the 2001 [547] district to the 2011 district is, of course, the problem of the 97,500 persons that had to be added to the new 2011 district. They had to go somewhere.

Q And would that have any sort of impact on his envelope analysis, the underpopulation in the 1st District?

A Well, it would certainly change the numbers on the charts. The – his conclusions might be similar, but in comparing the two plans, they wouldn't be true and accurate.

MR. FARR: All right. Your Honor, I have an exhibit for the witness.

THE COURT: All right.

MR. FARR: It's on our exhibit list and it's not been objected to.

BY MR. FARR:

Q Dr. Hofeller, I've handed you Exhibit 114. Did you prepare this exhibit?

A I did.

Q And could you tell the Court what this is.

A This is a table which shows the percentages of total adult black population which would be TVAP, black TVAP for the areas inside of and outside of the

districts for the 12th in various maps. The 2001 enacted plan, the 2011 SCSJ plan, the 2011 Fair and Legal plan, those two plans were the plans that were submitted as proposed maps by parties for the 2011 Congressional redistricting, and then on the far right the 2011 [548] enacted plan, and it shows those counties that were split. In any of those plans where you see the kind of dotted shading the county was not involved in a county split in that particular plan.

Q All right. I want to make sure the Court understands this exhibit, Dr. Hofeller. In the first column you have the word "county?"

A Yes.

Q What counties are listed under that column?

A Do you want me to read them all off?

Q No, no, I mean, why are they in the column?

A They're in the column because they were split in one of the four plans that I'm demonstrating by this exhibit.

Q Okay. And the four plans you looked at were the 2001 Plan and then the next plan was proposed by who?

A The Southern Coalition for Social Justice, SCSJ.

Q And was that before the legislature at the time the plans were enacted, as far as you know?

A Yes.

Q And what was the 2001 Fair and Legal plan?

A That was a plan proposed, I believe, by legislators very, very close, within several days, of the enactment of the 2011 map. It really wasn't available to us when we were drawing the plan.

Q Okay. And then the last column is the enacted plan in [549] 2011?

A Yes, Rucho-Lewis 3.

Q All right. Let's look at Rucho-Lewis 3 for the county of Durham and explain to the Court what outside and inside means so they fully understand this.

A Okay. Again, if you look at the last two columns on the right under the heading 2011, then you look at the two headers outside and inside, it would tell you that the area outside of the 2011 district was 20.49 percent African-American. The area inside was 49.02 percent African-American.

Q And so that would be true for all the other entries you have on this exhibit?

A Yes.

Q Did you reach any conclusions after you looked at this exhibit?

A Let me just briefly look at it.

Q Okay.

A With the exception of Greene County, the percentage of the African-American population outside the district was lower than the percentage inside the district, which is exactly what you would think would be the case since the district we're talking about is an African-American majority district.

Q Okay. So in the enacted plan, the African-American population in Greene County was higher outside the district than inside the enacted 2011 district, is that right?

[550] A That's correct.

Q Now, does that – and the other plans that you analyzed – how does the black percentage inside and outside of each version of the 1st District compare in those counties that were split?

A Well, the 2001 enacted map, the baseline map as we sometimes refer to it, where there was a county split, the percentage of African-Americans in the portion outside the district was less than the portion inside the district.

Q And that's true for every split county in the 2001 enacted district?

A Yes.

Q And what about the Southern Coalition plan? How did – in the counties split by the Southern Coalition plan, how did the black population outside of the district compare to the black population inside the district?

A It was the same as the 2001 enacted plan. The percentages of the territory outside the districts were smaller than the percentages inside the district. Again, what you'd expect again in the creation of a minority district.

Q And then, finally, what about the 2011 Fair and Legal version of the 1st District, how were the – what was – what were the black percentages in the split counties outside of the district as compared to the portions inside the district?

A The portions inside the district had higher percentages [551] than the portions outside.

MR. FARR: That's all I have on that, Your Honor. May I approach the witness with another exhibit?

THE COURT: You may.

BY MR. FARR:

Q Dr. Hofeller, I've handed you an exhibit marked Defendant's 130. Could you tell the Court what this is.

A This is my third affidavit in this case – I'm sorry, in the *Dickson* case. Sometimes they merge together a little bit. It was submitted, I think, on the 10th of December in 2012.

Q All right. I just want to ask you a very few questions about this exhibit, Dr. Hofeller. Does this exhibit contain your criticisms of Dr. Peterson's segment analysis?

A Yes.

Q Could you tell the Court where that starts.

A It starts on page 2 under Heading 2, which is Dr. Peterson's segment analysis, and it continues on through page 6 when the report goes into a different topic.

Q And do you recall some of the criticisms you had of Dr. Peterson's segment analysis?

A Well, first of all, I had a great deal of difficulty understanding his segment analysis because when we originally got it, we didn't get any of the underlying data or the pairs of precincts that he paired up against each other, so it took until I could write this third report to get enough data to [552] figure out what he was doing. So that was one problem right off the bat.

When we finally got the data, once again we confirmed that he was making his conclusions based on 29 of the 330 pairings that were around the border of this district; and, indeed, in many cases, the precinct inside would be paired with multiple outside precincts or vice-versa. So when I finally got the actual precinct pairs that he did, one of the first things I did was to look at where they were on a map and say, well,

what's the nature of these pairs of precincts that he's used.

And so I figured out that just to highlight it that 16 out of Dr. Peterson's 29 divergent pairs, which was what he based his decision on, were actually in that corridor area that was connecting Mecklenburg with – I guess for you, Your Honors, it would be this way – with Guilford and Forsyth County, so we called that the corridor connection. And that connection in many cases was only one precinct wide, and the decisions that were made to place that corridor were guided by two things. One was to get through that corridor area with the least population that you needed; and, two, was the placement of the corridor was guided by the balance of the population between the new 5th and the new 8th District. So the corridor was moved to the southeast in order to accomplish that adjustment of population.

[553] The other thing that's noted about the 12 divergent pairs is they're in areas where the African-American registration is extremely low. If I were to make a shaded map of those percentages, they would be in the – a very large category, which would be the very lowest one. So it didn't take into account as to whether or not, for example, that the black population was 8 percent inside and 6 percent outside rather than some much larger number which would tell a story.

Another problem, of course, was that if you're drawing the district, even withstanding if you could take this divergent analysis into account as you're actually drawing the district, which you can't, the software wouldn't accommodate it, and the computers wouldn't accommodate it, you may find that the situation on one side of the corridor precinct was exactly the opposite of the situation on the other side of the precinct, so would you have to arrange that

corridor so the political and racial characteristics of the pair-up of the inside and outside precinct were the same, and I don't think you could take that corridor through that way.

The other problem was that in some cases the same precinct, either inside or outside, was being paired two times or more with a different precinct on the other side of the line. So using the same precinct, in my opinion, twice gives a slight bias to it. So – and none of the divergent pairs in that corridor had to do with any precincts that had high Obama [554] vote or political vote.

So if you subtract those out, you have very few left. You have 11 divergent pairs, if you look at the precincts that were double counted, and I guess my objection to this method was to base what I felt was kind of a sweeping generality of the motivations of how this was drawn – this district was drawn on the basis of 11 pairings of boundary precincts out of 330 precincts, just doesn't make much sense.

Another problem that I had with this divergent precinct theory was it doesn't take into account the size in voters or population of the precincts. So one precinct could be three or 4,000 people, the other precinct could be 500. So there was no correction for amplitude of the precincts. What he really made was what I would call a two tailed test, yes or no, based on what was in the precinct.

And just for illustrative purposes, I went and analyzed the Obama/McCain vote by precinct in the state of North Carolina, and I found that if you just assigned a one to a precinct where Obama won and a one to – and a zero to McCain and the reverse for where McCain won, that McCain would have won the election that year. So it's just – to me it's just very

shaky in terms of being able to draw the conclusions he drew.

Q All right. Thank you, Dr. Hofeller. I just have a few more questions. Could you turn to your first report, [555] Defendant's Exhibit 25.8, which was, I think, prepared on January 17, 2014.

A Okay.

Q I want you to –

A Okay. I'm not there yet.

Q Okay. Sorry.

A Could you give me the name of it.

Q It's – the front page says exhibit and expert report of Thomas B. Hofeller, and there's a blue sticker on the bottom that says Defendant's Exhibit D-25.8.

A 25.8?

Q Yep.

A Have it.

Q What I want to do here is I want to turn to the tables in this exhibit to make sure that the Court understands what your tables are. So let's start with Table 1.

A Yes, sir.

Q Could you tell the Court what Table 1 is.

A Table 1 is just a listing of the cities or towns that were split along the border or split, in some cases, internally one case in the two plans, so on the –

Q For which district?

A For the – well, for –

Q We're looking at Table 1 right now.

A Table 1 is the 1st District.

[556] Q You're comparing split cities or towns between the 2001 Plan and the 2011 1st District, correct?

A Yes.

Q Can you just – without going over all this, what was your concern about the way Dr. Ansolabehere described the split towns in comparing these two plans? Did you have any concerns?

A Well, again, I'd have to review my report on the side, but I think I had a concern in his analysis of the plan that there were several cities, three where the splits were either zero or extremely small and were noncontiguous.

So in North Carolina sometimes you find that a very small portion of a city is outside of the regular boundary of the city. It's a little kind of a satellite. I theorize it usually probably for some utility function, like a dump or water or whatever, and so that would lower the – in my mind, the significance of the splits of those cities.

Q Okay. Can you turn to Table 2 and tell the Court what that is.

A Table 2 is essentially the same chart for District 12.

Q Okay.

A And the two plans split the same number of cities, which we both agree on, Dr. Ansolabehere and I; different cities, but the same number.

Q And could you tell the Court what Table 3 is.

A Table 3 is just a resummary of his envelope percentages [557] for the 1st District, both the old map

and the new map and the 12th District for the old map and the new map.

Q Okay. Let's look at one of these in detail so the Court understands exactly what you did. Let's look at Congressional District 1, which is the top chart. What's the first column there?

A The first column is the party of registration.

Q Okay. And then what's the second column?

A Second column is the group which subdivides the Democrat and Republican and undeclared into black and white.

Q Okay. And the third column is?

A And the third column gives the percentages of the group in the old district.

Q Okay. So, for example, in the Democrat horizontal section, if you look at white, you're saying that 39.6 percent of white Democrats were in the old Congressional District 1?

A And were Democrats.

Q Right, is that correct?

A Yes.

Q Okay. And then what's – it says percentage black and percentage white, what does that mean?

A That's just the black figure subtracted from the white figure, so it's an 18.7 percent difference.

Q Okay. And you used the same methodology on all the other charts on this table, is that correct?

[558] A Yes, if you divided it into four sections, it would be the same.

Q Okay. All right. Now, let's now turn to Table 4, and could you tell the Court what this is.

A Table 4 is for the 12th Congressional District, and it compares the 2010 Census data results and the 2008 general election data for president for the areas that are both in the new and old, which is the core of the district in both cases.

Q I think we need to explain this one a little bit, Dr. Hofeller, to make sure the record's clear. So we're looking at the top chart and the first column on the left-hand side says area examined, correct?

A Yes.

Q And what are the areas that you listed?

A The area in the new and the old, the core area, essentially.

Q Any other areas?

A The second area is the area that was only in the old 12th but wasn't in the new 12th.

Q And the final area?

A The area only in the new 12th that wasn't in the old 12th. Previously we looked at a map of these areas.

Q Okay. And then there's a next chart moving to the right that says 2010 Census data. Could you explain that chart, please, to the Court.

[559] A Again, it gives the total population. To the right of that is the 18 year old total population and the 18 plus total black population and the fourth column is the percent total black.

Q So –

A Black voting-age population for all people who designated black as a single race or part of a multiple race category.

Q Okay. So the area in the new – in the old 12th had a – any part black voting-age population of 56 – 54.22 percent?

A Yes, both in the new and the old.

Q Right. And then below that you've got area only in the old? Could you explain that, please.

A Again, this is essentially the area that was removed from the 12th District when it was redrawn, and it was 22.77 percent African-American in adult population.

Q Okay. And then you've got area only in the new 12th. What does that percentage mean?

A Again, that is the percentage, 43.24 percent, of the total black VAP or total 18 plus total black, which was added to the new 12th as it was constructed.

Q Okay. And then you have a column that says percent added minus percent removed areas, and you've got a number of 20.47 percent. Could you tell us what that means.

A That was just the difference in percentage between the area added and the area taken out which said that the area [560] added was 20.47 percent more African-American than the area that was taken out.

Q All right. Now, could you kind of briefly explain the next chart to the right about the 2008 general election and tell the Court what that is.

A This is the same figure for the 2008 general election for president which has the total vote for Obama plus McCain, the total vote in the first column, the total vote for Obama in the second column, the

total McCain in the third column, and the percent Obama. So essentially it says that the core area, which is both in the old 12th and the new 12th, was 79.92 percent Obama in terms of the vote.

The area that was taken out, which is only in the old and not in the new, was 53.01 percent Obama, and the area that was put into the 12th, that wasn't in the old 12th, is 75.39 percent Obama.

Q And then what does the – you have a figure there percent added minus percent removed in the last column of Table 4 of 22.38 percent. What does that reflect?

A That reflects the difference between the 75.39 and the 53.01 percent, so the area put in the 12th had a higher, much higher, presidential vote at 22 percent higher presidential vote for the Democratic candidate than did the area that was taken out.

Q Okay. Now, the next question is, what is the chart at the [561] bottom of Table 4?

A It's actually a little bit different. It was put in there to emphasize the differences in population in the counties between the old and new district so –

Q And what does that show about – you have the urban counties of Guilford, Mecklenburg, and Forsyth, and then you have the three corridor counties. What does this chart show about how the population changed in the urban counties versus the corridor counties?

A Well, of course, the change in population in the urban counties, the three largest counties, was much different as to those counties, and I think – I think I explained that before when we started that much more of Guilford was added back into the new 12th District. That was really to help the 6th District. Less of

Forsyth County was contained in the new district than in the old district by about 90,900, 91,000, and that was done because – for two reasons. One because the 5th District was stronger to begin with and could take those Democratic precincts and also because it was really a trade off in the map politically between what you had in Guilford and what you had in Forsyth, sort of like two ears, and so if one went down, the other went up because of what was needed to be done in Mecklenburg for the 8th and the 9th District.

And, of course, in Mecklenburg 98,960 more people were added into the new 12th that was constructed; and, again, [562] that was part of – mostly because of the 8th District because we wanted to withdraw as much of the 8th District from Mecklenburg, and the part we wanted to withdraw, we didn't really want to put in the 9th. So, again, the Mecklenburg line was more designed to strengthen the 8th by removing it from Mecklenburg County and to strengthen the 9th by where that line went.

The corridor, which were the three other counties, Davidson, Rowan, and Cabarrus collectively, had 60,000 less people in them in the new district than they did in the old district; and, again, that was to allow us to do what we needed to do in the metropolitan counties, vis-a-vis the surrounding districts and also for population correction between the east side and the west side of that corridor.

Q Okay. Dr. Hofeller, I just have a couple more questions, and I'll be done. Could you turn to Dr. Ansolabehere's second report which is Plaintiff's Exhibit 18.

A Yes.

Q Now, you see his Table 1 where he talks about a correlation between Obama share of two-party vote

and racial composition and registered voters and VTDs?

A Yes.

Q So the only question I want to ask you is, did you use registration statistics to draw Congressional District 12? A No.

[563] Q And why not?

A Well, first of all, in my judgment, once again, the best predicator of future voting behavior is past voting behavior, and the other thing is that if I'd used registration statistics, particularly racial registration statistics, I would have violated my instruction, which was not to use racial data in drawing the 12th District.

The other problem I have with using racial registration statistics in drawing districts is that I don't believe they're as accurate as some might purport they are. First of all, if you were going to use registration at all, I believe you should be using the turnout registration rather than the total registration because a lot of people aren't voting, and that would skew the number. It is not a practice, in actual district drawing, to use registration numbers.

You don't account for, for instance, the unaligned vote. So how are you going to account for that, so it's just not practical. I was told to treat the 12th District as a political district as it was treated in 1997 by the legislature and as it was treated in 2001 by the legislature. It's a political district, and what was done to the 12th district was all about politics. It was to make it a stronger Democratic district and to place it on the map in the areas where it was most advantageous to the surrounding districts.

Q And Dr. Hofeller, you used the term "unaligned voters," [564] what did you mean by that?

A Those are voters that don't give a party.

MR. FARR: Okay. Your Honor, that's all I have for now, and I was wondering, since it's a little bit past 10:30, could we take a break?

THE COURT: Let's take five minutes.

MR. FARR: Thank you. Thanks very much, Your Honor.

THE COURT: We'll stand at ease for five minutes.

(At 10:38 a.m., break taken.)

(At 10:57 a.m., break concluded.)

THE COURT: All right. Cross-examination?

MR. HAMILTON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. HAMILTON:

Q Good morning, Dr. Hofeller. Let's start with where we left off. One of the things you said twice over the course of your testimony, and again just before you finished, was the best predicator of future behavior is past voting behavior. Did I quote you correctly?

A Yes.

Q Okay. So if I could direct your attention to the table that's right up there on the easel right next to you, and, Your Honors, there's a witness notebook that we provided to the Court as well, and if it's easier to see, there's a version of this behind Tab 1 and behind – I guess it's behind Tab 1, and

* * *

[569] THE WITNESS: I'm sorry, Your Honor.

MR. HAMILTON: It was a poorly phrased question.
THE COURT: How about rephrasing the question, and make it a little – one question at a time.

MR. HAMILTON: Thank you.

BY MR. HAMILTON:

Q Dr. Hofeller, since you didn't analyze, you didn't review Dr. Peterson's segment analysis in the original *Cromartie* cases, you can't offer an opinion about how this border segment analysis offered here is the same or different than the border segment analysis offered there, right?

A I can tell you neither if it was exactly the same method, nor what actual data led to what actual conclusions.

Q All right. A moment ago – let me direct your attention to Exhibit D114. It was one of the loose exhibits offered by counsel a minute ago, and I think I put it right in front of you so it would be easy to find. D114.

A Yes.

Q All right. Now, if I understand this table, you prepared this, right?

A I'm sorry, I didn't hear the last part of your question.

Q You prepared this table?

A I did.

Q When did you prepare this table?

A Probably a week before last, I'm not sure.

[570] Q A week before last. This is not included in your expert report, is it?

A No.

Q So this was prepared and created after the Court's deadline for supplemental expert reports on June 1, right?

A Well, I didn't read the Court's supplemental order, so –

Q It was after June 1 you created this?

A Yes.

Q Okay. So let's look at it. You talked a little bit about it. In all of these places where there's these dashes in the columns instead of actual numbers, those are places where the county was not split, right?

A Either not split or not in the district at all.

Q Okay.

A In the case of the 2011 plan, Jones County wasn't in that district.

Q All right. And if we look – and we're looking at four different plans here; the 2001 Plan, the 2011 SCSJ plan, the 2011 Fair and Legal plan, and then the enacted plan, correct?

A Yes.

Q And of all four of those, the enacted plan splits the most counties, that's pretty clear from this table, isn't it?

A Yes.

Q And in the enacted plan, just focusing on that, in every single county, every single county, the black voting-age [571] population included in the district, this is the First Congressional District, exceeds the black voting-age population that's outside the district?

A Are you talking about –

Q All – every single one except for one in the enacted plan, correct?

A The 2011 plan. Yes, that's correct.

Q And when you say 2011, that – the 2011 I just want to make sure we're talking about the same plan. The 2011 plan is the plan that was adopted, sometimes we're calling it the Rucho-Lewis Plan, that's the plan that was adopted that exists today?

A Yes, but the same situation is true for the three other plans, too, except there are no counties.

Q Well, there's another difference with the other – two of the three other plans were never adopted into law?

A No, but I think – I think that they're more apt comparisons because if you remember, one of the problems with building the new 1st Congressional District in 2011 was that the Congressional District was 97,500 plus people short, and so there were a lot more difficulties involved in forming that district.

The other thing that was important about the first – the 2011 plan was that the placement of the 2011 plan, the placement of it was primarily dictated by politics and by the [572] policy decisions, the partisan policy decisions of the people who were instructing me to draw it. And so the configuration of the first was really all about, for the most part, the politics of the surrounding districts and how that enabled us to do what we wanted to do with those surrounding districts.

Q Okay. Well, we'll get to your instructions in a second, but my question actually was about the number of split counties in the enacted plan, and I think that your answer to the question is, with the exception of one county on this list, and that's Greene

County, in every other instance, in every single instance in which a county is split, the portion that's inside has a higher black voting-age population than the portion that's outside. Can you answer that question, sir?

A The answer is true, but I might further explain it by saying, as I did before, that if the 1st District was drawn to be a majority minority district, and the surrounding districts were not, that would be logically expected as indicated.

Q Sure. It would be logically expected that there would be more African-Americans inside the district if you were using race as a criteria to draw the district in order to get the black voting-age population above 50 percent, correct?

A I don't agree with the premise of your question.

Q Okay. Well, your instructions were to draw that district more than 50 percent black?

A Yes, but that isn't the question you asked me.

[573] Q Okay. But that – I understand, but you didn't agree with my premise, so I'm asking you a different question now which is, your instructions were to draw CD 1 as 50 percent black voting-age population or higher. True?

A No, my instructions were to – well, 50 percent plus one person.

Q So in light of those instructions, it's not surprising that we would see in every instance in which there's a split county that you're going to see more African-Americans inside than outside, right? That just follows?

A Yes, but even if it were drawn as a political draw, and it were a very strong Democratic district, the same would be true.

Q You talked a moment ago about Dr. Ansolabehere's envelope theory, and if I heard you right, I think you said – you were criticizing that where he's talking about split districts, and you said if you're building a minority district and only part of the district is going to be in or out, then it's just logical that you'd have this result where you'd have more African-Americans inside than out, and it's just, I think you said, Dr. Ansolabehere's it's just a fancy way of stating the obvious, and the obvious is that if you set out to build a minority district then, of course, the part that's in instead of the part that's out is going to have greater black voting-age population, right?

A Well –

[574] MR. FARR: Objection, Your Honor. It's like a compound question, Your Honor.

THE COURT: Well, there was a lot of preface to the question, but Dr. Hofeller seems to have followed it. If you understand the question, you can answer.

THE WITNESS: Yes, Your Honor. Okay. That's true in part. The other part of it is, as I stated just a few minutes ago, even if it were drawn as a Democrat district without regard to race, I would expect to see the same result.

BY MR. HAMILTON:

Q Okay. Let's look at Exhibit D124. Again, it's one of the loose exhibits that was handed up to you. This is the one as to which we've had some discussion about admissibility. Do you see that? Do you have that in front of you, sir?

A D124?

Q Yes.

A Yes.

MR. HAMILTON: And, Your Honor, at this point –

THE COURT: I understand. You're asking the question subject to our ruling.

MR. HAMILTON: Of course. Yes, that, but I also wanted to clarify because Your Honor asked earlier this morning about the box at the top of Exhibit 124.

THE COURT: Uh-huh.

MR. HAMILTON: And we do not have an objection to [575] that table. I want to make that clear for the record.

THE COURT: Okay. I didn't –

MR. HAMILTON: I don't – I think I reserved an objection earlier, and I just want to make it clear that we don't object to that part of this case.

THE COURT: It's just the two boxes below that?

MR. HAMILTON: That's right.

THE COURT: All right.

MR. HAMILTON: Thank you.

BY MR. HAMILTON:

Q Now, the question I have for you on Exhibit D124 is when was this document created?

A I think the same time as the previous document.

Q About two weeks ago?

A Yes.

Q Do you know why it wasn't produced to the plaintiffs in this case until yesterday, if you know?

A Well, it's really my job to prepare the materials, not to get them into the record.

THE COURT: So the answer is you don't know?

THE WITNESS: I don't know, Your Honor.

THE COURT: All right.

BY MR. HAMILTON:

Q Let's start at the beginning here, you received your Ph.D from Claremont Graduate School in 1980?

[576] A Yes, it's now called Claremont University Center.

Q You've never been a tenured member of any university faculty, correct?

A That's correct.

Q And, in fact, you've never been employed in any capacity as a faculty member of any university or college, right?

A That's true.

Q Fair to say that you have not published a great deal of scholarly articles or studies?

A That's true, and what I have is in my resume.

Q Now, you mention an article that you published over the few others. You testified to that yesterday, is that right?

A Are you referring to the article on compactness?

Q Yes.

A Yes.

Q Okay. But you've never been the sole author of any article in an academic journal, correct?

A That's true.

Q Now, you've worked for various Republican organizations for many years?

A I've worked for Republican organizations, Democratic organizations, and minority group organizations.

Q Fair to say the large majority of your work has been with Republican organizations and candidates, isn't that true, sir?

A That would be fair to say, yes.

* * *

[578] A Well, I testified in the *Bethune-Hill* case. I wasn't involved in drawing the plans.

Q Fair enough. So in that case you testified on behalf of the Republican intervenors in connection with a case that was very similar to this case, challenging a number of House and delegate districts in the House of Delegates in the Commonwealth of Virginia, right?

A Actually, I think to be accurate to the record, the people I worked for were the legislative leaders on the Republican side.

Q Who had intervened in the lawsuit?

A Yes.

Q That's the case we've sometimes been calling *Bethune* during this proceeding here?

A Yes, that's what I'd refer – *Bethune-Hill*.

Q And you were also in the courtroom during the trial of the *Page* case that was a challenge to Virginia's Congressional redistricting a year before that, weren't you? At least for part of the time?

A You know, that was in – I'm sorry, I'm trying to refresh my memory. That was in Richmond also.

Q That was in Richmond, *Bethune-Hill* was in Alexander.

A I actually do think I was in the room for that.

Q And were you paid to be there or did you just show up out of curiosity to watch some of the trial?

[579] A Well, I wasn't getting hourly pay. I have a retainer, a monthly retainer, from the Republican National Committee, and I was interested in the case, and I wanted to go down and hear it, and it was also close by.

Q Okay. And did somebody ask you to go, or did you just go because it was close by?

A I think it was more of my own volition than anything else.

Q Now, you were involved in other states as a consultant on behalf of Republican Party organizations or elected officials during this redistricting cycle other than just Virginia and North Carolina, right?

A I guess I'd really have to review my resume.

Q Let me – let me – I'll do it for you, and you tell me if I misstate anything. You were involved in Texas?

A I was involved but peripherally involved. I wasn't really, to my recollection, involved in any court cases having to do with the legislative districts or the congressional districts. I did do some work in county level cases.

Q Okay. Well, and so just to be clear, I don't mean to make this confusing, but you were either involved in litigation or in drawing the map or consulting with

the legislators about how to draw the map in the following states: One is Texas, right?

A Okay. I think we could clarify it a little bit in Texas.

Q Sure.

A We were, of course, from the national viewpoint very [580] interested in Texas; and, of course, as I do in many states, I draw maps to find out what can be done. Sometimes I like to call them goal post maps. You know, what would happen if the Republicans drew the best map, what would happen if the Democrats drew the best map. Kind of gives somebody at least a logical perspective to see what they're asking for because some people ask for things that are ridiculous.

Q You were also – I'm sorry, I didn't mean to interrupt you.

A I'm sorry. Okay.

Q I just wanted to move along because I really just want to establish you've been involved in a number of different states recognizing –

A Yes, but the degree to which I've actually guided the map drawing, other than advising people on how to redistrict and how they could get into trouble and warning about things, is different from they depended on my advice while they were actually drafting and took it.

Q Fair enough. Fair enough.

A Okay.

Q You were involved with Florida, correct?

A Not really.

Q You had no involvement in the Florida redistricting or any

of the litigation after that?

A Well, I had involvement in the litigation because you [581] subpoenaed me for the Florida case, but that subpoena was never I believe – again, I'm not an attorney. I don't think it was ever really executed.

Q You were involved in Maryland?

A Yes, there was a case in Maryland.

Q You were involved in Mississippi? You even filed a declaration in Mississippi, didn't you?

A I'm sorry, I don't really remember. There was a lot of work going on, but if it's in my resume, I certainly went there.

Q While we find the citation for that, how about Arizona? You were involved in 2000 – in this cycle in Arizona, too, weren't you?

A This cycle?

Q Yeah, in 2010?

A Yes.

Q South Carolina?

A Once again, I'd have to check my resume.

Q Okay.

A It doesn't really come to mind right off.

Q Missouri?

A Yes.

Q New York?

A Yes, but that was a county case.

Q On behalf of Republican legislators or party [582] organizations, correct?

A Well, it wouldn't have been leg – it might have been county legislators; but, actually, I don't think that my expert report was ever actually submitted. I looked at the demographics of Nassau County.

Q You were also involved in the *Penway versus Harry* case in Texas? Galveston?

A Yes.

Q Now, all this work is through your business Geographic Strategies, LLC, correct?

A Well, we just went through a long number of cases.

Q Yes.

A Some of these cases I wasn't paid for specifically. I mean, for instance, my involvement in the *Page* case was just voluntary, so most – the bulk of the work was through the LLC, yes.

Q And that's called Geographic Strategies?

A Geographic Strategies, LLC, yes.

Q Dale Oldham is your partner in that company?

A He is.

Q He's sitting here in the courtroom today?

A He is.

Q He was also with you in Virginia during the *Bethune* trial?

A No, I don't believe so.

Q You don't believe Dale was in the courtroom when you [583] testified?

A I don't remember his being in the courtroom.

Q Okay. And what you do through Geographic Strategies is provide redistricting services to your clients, whoever they might be?

A Yes, and I think we also mention litigation support.

Q Okay. Now, I take it Geographic Strategies, LLC, you're not the only person out there in the world that does this sort of thing to assist political parties on either side of the spectrum in connection with redistricting, true?

A That's true.

Q You have competitors out there?

A I guess you could say that, yes.

Q I'm sure you're the very best anyone could ever hire, but there are other choices out there, isn't that true, sir?

A Well, thank you very much. Yes, there are other choices.

Q And redistricting services, consulting, map drawing, all that, that's – fair to say that's the core of what your business does, Geographic Strategies?

A That's fair.

Q Your clients are looking to you to advise them or maybe in some cases actually draw a map that will stand up to a legal challenge, true?

A I would hope so, yes.

Q And –

[584] A That's kind of a two-part question, so maybe you could ask it in two different parts. I might give a different answer to each part.

Q Well, your clients are looking – when you're drawing a map for a client on behalf of Geographic Strategies, LLC, your clients are looking to you to draw a redistricting plan that will stand up to legal challenge?

A Again, I hate to mince words here, but if I'm drawing maps or advising a client, I might, from my perspective as a non-attorney, and I always recommend to all my clients that they get an attorney, a counsel, never travel without counsel essentially, that I might say to them, I don't think we should do this or that, and I think we should do this, but ultimately it's their decision as to how they want to proceed. Otherwise, I wouldn't have clients.

Q Of course. And you're not a lawyer?

A No.

Q We've established that. So, of course, you would tell them, rely on legal advice, right?

A I always advise people that they should get competent legal advice.

Q So in your declaration, your expert reports, there's – there's a variety of different statements about *Strickland and Cromartie*, and other Supreme Court cases. You're not a lawyer, you're not offering legal opinion on what those cases mean, [585] right?

A I would just be putting down my view of how I understand them.

Q And how –

A Knowing that it's – it's not in the context of litigation, a legal opinion.

Q Okay.

A But I might tell a client at some point you really should look at this case, it applies. Just as all academics, too, would be, if they're actually doing redistricting work, would be familiar with the case law.

Q Sure. And you would tell them you really should look at these cases and talk to a lawyer about what they might mean as applied to this factual situation, correct? Because you wouldn't be offering them legal advice?

A I don't offer legal advice.

Q Because you're not licensed to practice law?

A That's right.

Q So the Court – you'll agree with me that the Court can read *Strickland* and *Cromartie* and all those other cases and decide what they mean and they shouldn't really pay much attention to your declaration on those points because you're not a lawyer.

A Well, I think they can give it the weight that they think it deserves. It's not a legal opinion, but –

[586] Q Okay. Fair enough.

A Whether or not they're going to pay attention to it is really up to them.

Q It's up to the Court.

A Sure.

Q You were personally involved in the redistricting in North Carolina at the time the General Assembly drew these maps, right? That's what we've just established for the last couple of hours.

A Yes.

Q In fact, you were intensely involved in this process?

A I think that's a fair statement.

Q It's also accurate they call you the principal architect of the congressional plan that we're examining here today?

A I think that's been stated for the record.

Q So when we're looking at these enacted plans, these maps that we've been focusing on for the last couple of days, we're really looking at your handiwork? You know every single dot and squiggle on those maps because you drew them, right?

A I think that's a bit of an overreach. One of the things that happens is sometimes other maps are looked at, but it was my job to keep and examine and give my opinion on the actual copy of the map as it was being drawn. So I don't describe myself as being the sole decision-maker. The decision-makers in this map are the members of the General Assembly who are [587] responsible for the map.

Q Of course. And you didn't have the power to adopt the map or enact it into law; that was the power that rested in the General Assembly of North Carolina, correct?

A For sure, yes.

Q Okay. If the plan is struck down, though – the plan that got struck down is the plan that you were intensely involved in and that you drew pursuant to the instructions of your clients, correct?

A I guess that's a fair statement, yes.

Q Now, you weren't hired by the North Carolina General Assembly as a whole, isn't that true?

A I was hired by the law firm.

Q And when you say "the law firm," you mean Mr. Farr's law firm?

A Ogletree Deakins.

Q Ogletree Deakins. And his client was Senator Rucho and Representative Lewis, wasn't it?

A I think you have to ask him who his formal clients are.

Q You don't know?

A Well, I don't – for sure, Senator Rucho and Representative Lewis were clients, but, officially, there might be somebody else involved. I just don't know.

Q You don't know. But that somebody else wasn't the General Assembly as a whole; it was Mr. Farr's law firm, Ogletree [588] Deakins?

A Yes.

Q How many times did you meet separately with the Democratic

Caucus while you were drawing these plans?

A I don't recall ever meeting with them.

Q How many times did you meet with the Democratic leadership in the North Carolina General Assembly while you were drawing these plans?

A I didn't meet with them at all.

Q Well, how about joint meetings of the Democrat and Republican leadership? How many times did you meet in a joint setting with the Democrats and the Republicans to talk about the map you were drawing?

A I don't know that there were any joint sessions, but I didn't meet with – I already told you I didn't meet either jointly or singularly with the Democratic leadership.

Q Fair to say that you never once talked personally with Representative Mel Watt about the 12th District and the 2011 Redistricting Plan, correct?

A Yes, that's correct.

Q It's also fair to say that you've never talked once to Representative G.K. Butterfield, you know, from the 1st Congressional District about the 2001 [sic] Redistricting Plan, right?

A I'm sorry, which plan did you say?

[589] Q 2011 Redistricting Plan?

A Okay. That's true.

Q The fact is you took your directions with respect to drawing these two congressional districts from Senator Rucho and Representative Lewis, right?

A That's correct.

Q Didn't get instructions from any other member of the General Assembly?

A I was responsible to these two individuals for the map, and any map that would have come forth to go into bill form to go to the floor would need their approval.

Q So it's fair to say you answer to them?

A I felt I did.

Q And they gave you directions for drawing the map?

A Yes.

Q But they didn't give you directions in any written document, isn't that true?

A I think I already testified to that in other cases in depositions, yes.

Q Well, you might have, but, unfortunately, you know, I have to bring that up here because these –

A Right, no, I didn't get written instructions. I'm sorry.

Q So we're not going to see any documents saying, hey, here is the criteria for drawing these maps that they gave to you; so be sure you do X or be sure you do Y? They didn't do that, [590] right?

A You would find no document that says, to me from them, here is what we want you to do in writing.

Q And there's no email in which they send those same instructions in email?

A No.

Q To the best of your knowledge, there's no written record anywhere of the instructions you got from Senator Rucho and Representative Lewis?

A That's my recollection, yes.

Q Now, Dr. Hofeller, I note you've got a Toshiba laptop, right?

A I do.

Q Runs Windows 7?

A Yes.

Q How many other computers do you have?

A Personally?

Q Yes.

A I have a desktop computer at home.

Q Yes.

A Which I use primarily for personal stuff. Sometimes I bring items over to email them or print them. I don't have a printer now working off my Toshiba, so I have to –

JUDGE OSTEEN: All right. Let's just stick to the numbers for right now.

[591] THE WITNESS: Yes, Your Honor. I have this – I believe it's a Dell, but I'm not sure. BY MR. HAMILTON:

Q The desktop computer at home. Okay. Do you have any other computers at home?

A There's another computer at home, which my wife uses exclusively.

Q Okay. And how about at work?

A Well, work is home.

Q So this is – which is the computer – so you've got three computers here, one of which is exclusively your wife's. You've got a desktop and a Toshiba laptop, and those are the only two computers that you use in connection with your work?

A Once in a while, if I'm up at the Republican National Committee – I have an account there. I would have to say, for all practical purposes, I don't really have a computer there. I would have to log on to somebody else's machine.

Q But you do that –

A I don't do – I don't really do redistricting work up there –

Q I see.

A – on districting.

Q Most of your redistricting work is done in your office, which is at home?

A Yes.

[592] Q You save all that information on a computer or hard drive on the laptop? On the desktop? Where is it stored?

A Well, the computers all have hard drives, and all the data is stored on those hard drives.

Q So we've been talking about Maptitude, and you testified a moment ago this morning that you did some, you know, kind of what-if maps early in the process, and we've got all these other kinds of maps that are drawn up. Is that data all saved on your hard drive on your – on the one Toshiba, or do you have an external drive? I'm just trying to understand where the information is stored.

A Okay. The information – my redistricting computer that I draw plans on is the Toshiba. It's the only computer that has Maptitude resident on it. The other computer doesn't. And the data is all stored on the hard drive, but there's also a backup.

Q A backup electronic hard drive?

A You know, an external disk drive that serves as a backup. I'm not so sure I know how to retrieve data from it because I've never had a disk crash, so I haven't had to scream for help.

Q How often do you back it up?

A Actually, right now, except when I'm on the road, it's being backed up constantly.

Q And you have an email account, right, Dr. Hofeller? I [593] think we actually read it yesterday in connection with one of the documents we were looking at –

A Well, my wife and I share an email account.

Q And what is that email address?

A Celticheal@aol.com.

Q Okay. Celticheel? H-E-E-L at aol dot com?

A C-E-L-T-I-C-H-E-A-L. My wife wanted to get celtichealer, but the account is so old that they wouldn't give us that many letters.

Q Okay. And that's the – and you use email to communicate with people in connection with your business?

A I do.

Q Okay. And that's the – but that's the only email that you use for that purpose?

A No, I have an account at the RNC.

Q You have an email account there?

A I do.

Q And what's your address there?

A Thofeller at – I think it's gop.com now. It used to be rnchq.org.

Q Are those the only two email accounts you have?

A I have a Gmail account, but I really don't use it. I think I've only sent one message on it, and it was personal.

Q Okay. So your – and then – so we've got those three email accounts: The AOL account, the gop.com account, and then [594] this Gmail account that you don't use?

A I opened it up and decided it was too much trouble to use.

Q Totally understand. Those are the only three email accounts you have?

A Yes.

Q Okay. And so if someone wants to reach out to you and communicate with you in connection with – maybe they want to hire you, they would send the email to the celticheal@aol.com, is that right?

A If they were going to communicate to me by email, they might phone me.

Q Well, sure, of course, or meet with you personally; but if they wanted to communicate by email, that's the way they would do it; they would send it to that account?

A Yep, that's true.

Q But you didn't use that account in connection with redistricting in North Carolina, right?

A I don't know what you mean by "that account."

Q That account, the celticheal@aol.com. If we were to go through your inbox and all the stored email, there would be nothing in there about North Carolina's redistricting because there would be nothing in there, is that right?

A No.

Q There is some information in there?

A I have communicated between myself and my client, the [595] attorneys.

Q With respect to redistricting in North Carolina?

A Yes.

Q So a moment ago you said that you were told that the directions for drawing CD 1 and CD 12 were all oral. Do you recall that?

A Yes.

Q So the emails that we would see in there, I take it, are not directions relating to the construction of CD 1 and CD 12? A No.

Q Well, what would they be then if they weren't discussions of how to draw those two districts, sir?

A Well, I wrote a lot of – I'm sorry.

MR. FARR: Your Honor, I would just like to object at this point in time. I don't really know what this has to do with his –

JUDGE OSTEEN: Let me see counsel up here at the bench so we don't tip the witness.

Dr. Hofeller, sometimes I'll bring counsel up here. I think it'd be awfully hard to have to sit and listen to a discussion about objections to testimony without that shaping testimony. So sometimes I'll do it at the bench.

(Bench conference as follows:)

JUDGE OSTEEN: Okay. The way I see this going so far is the question about how did you get your instructions to [596] narrow down the field to – because what we've heard – the only set of instructions that we've got – I think it's fair that his having testified that my instructions were oral, these were my clients –

THE REPORTER: I'm sorry, I can't hear.

JUDGE OSTEEN: These were my clients and to ensure – to – and the instructions were oral to ensure that there's no other source of instructions that would come in to play here. I'm assuming the answer is going to be, no, that I didn't get any other instructions. It seems to me a little bit of inquiry in terms of what kind of communications. Well, if it's anything but

instructions, without going into the substance of it. Does that make any sense to you?

MR. FARR: Yes, Your Honor, I would just say that it's hard to ask the witness hypothetical questions about emails that he may or may not have received.

JUDGE OSTEEN: The danger I see is the witness – I think I'm going to instruct the witness at this point, and these other judges may disagree, just to – without going into the substantive content is describe the nature of the emails first to confirm, and let's see if that gets us to confirm any formally written instructions. Does that seem reasonable?

MR. FARR: I would defer to the Court, Your Honor. Again, I just think it's hard for the witness – I don't remember who emailed me last week. So it's hard to be [597] responsive to hypothetical questions about what you might have been told in an email or not; and if they have emails, then they ought to show them to him.

MR. HAMILTON: Your Honor, this witness has been very clear from the beginning that there's no writings at all. This is all done in a verbal way. I think that's telling and relevant and that –

JUDGE OSTEEN: There aren't any emails on the exhibit list at this point. So you don't dispute that testimony?

MR. HAMILTON: Well, we just heard for the first time that he's got all sorts of – well, he's got communications relevant to the North Carolina redistricting in email, just not what he would call –

JUDGE OSTEEN: It's a pretty broad category –

MR. HAMILTON: It is, it is.

JUDGE OSTEEN: – show up for your deposition (inaudible) –

MR. HAMILTON: Exactly.

JUDGE OSTEEN: The key point to you at this point is simply is there anything in there that might have been an instruction? I understood his answer to be no.

MR. HAMILTON: Right.

JUDGE OSTEEN: So I'll let you test it a little bit, but I think because we're talking about, as I understood it, communications between this expert engaged by this firm, the [598] danger of treading into attorney-client communications runs high, but to the extent – you're entitled to confirm, as best you can, that there's no instructions included.

So I'm inclined at this point to instruct him that he can describe without going into the substantive comment – content, just the nature of the communications to further explain no written instructions.

MR. HAMILTON: And I will try and stay within the bounds there.

JUDGE OSTEEN: You stay on your toes if he starts drifting.

MR. FARR: And I will just say if he remembers, Your Honor.

JUDGE OSTEEN: If he remembers.

MR. FARR: Okay. Thank you.

(Bench conference concluded.)

(Discussion among judges.)

(Bench conference as follows:)

JUDGE OSTEEN: All right. One concern that we all have is to the extent there may – and I'm not suggesting this happened, but this is an issue. If there were other instructions given with respect to the map drawing that came through counsel that are contrary to or maybe over and above what he's testified to in terms of the legislature, then I think that would be fair game on inquiry because we've got an [599] issue in there.

So at this point I'm going to give the instruction that I talked about; but to the extent there were directives, I'm going to expand it to say to the extent there were any directions given with respect to map drawing, then you need to describe that. Do you understand that?

MR. FARR: I think so, Your Honor.

JUDGE OSTEEN: So it's without revealing substantive content, describe the nature of the communications with one exception, and, that is, if there were any additional instructions given on behalf of the legislature or given with respect to the drawing of the maps, you need to talk about that, and then we'll have to go through it piece by piece on that. Is that clear?

MR. HAMILTON: I think so.

JUDGE COGBURN: If the instructions relate to the facts, doing what he was told to do, then that's fair game. If he's a traditional expert, and he looked at reports (inaudible) was told to do (inaudible) –

MR. HAMILTON: Sure.

JUDGE COGBURN: In other words, you can't (inaudible)–

THE REPORTER: I can't hear. I don't think that microphone I working –

MR. HAMILTON: Understood, understood. I'm not [600] intending – I don't want to get into Mr. Farr's –

JUDGE OSTEEN: We want to make sure you all understood the added component to the instruction I'm getting ready to give so he knows where we're going.

MR. HAMILTON: Okay. I appreciate that.

JUDGE OSTEEN: Anything you want to add?

JUDGE GREGORY: No.

MR. FARR: Thank you, Your Honor.

(Bench conference concluded.)

JUDGE OSTEEN: All right. Dr. Hofeller, I hope you recall the question. I'm not sure I fully recall the question, but the question related to email communications that you may have had with counsel in this matter. And I'm going to instruct you to answer the question with the following instruction: One, in responding to the question to the best you can, describe the nature of the communications without describing any substantive content of the communications. Do you follow that?

THE WITNESS: I do, Your Honor.

JUDGE OSTEEN: And second, to the extent you received any instructions in your capacity, as the individual drawing the maps on behalf of the legislature, with respect to the maps themselves or how they were to be drawn, then I need you to describe that through these emails. Do you understand that?

THE WITNESS: Yes, Your Honor.

[601] JUDGE OSTEEN: All right. You may answer the question.

MR. HAMILTON: Thank you, Your Honor.

BY MR. HAMILTON:

Q So let's start with – you – I believe we've established that there are emails that you received relating to redistricting as a general matter on your email accounts, one or more of your email accounts, correct?

A Yes, from all across the country.

Q Okay. Well, I'm actually interested in whether you received communications directly or indirectly from Senator Rucho or Representative Lewis with respect to drawing CD 1 and CD 12 during the 2011 redistricting cycle in North Carolina?

A I did not.

Q Okay. So maybe you could describe for us the nature – without getting into the substance of them, the nature of the communications. I'm trying to understand the line between this – you received communications about this subject, but you didn't receive instructions. So I just want to make sure we're talking about it mean – what an instruction is.

Did you receive guidance from Senator Rucho or Representative Lewis with respect to CD 1 and CD 12?

A Via email?

Q Via email.

A No.

[602] Q Okay. Did you receive instructions from Senator Rucho or Representative Lewis through counsel with respect to how to draw CD 1 or CD 12, and by counsel, I mean –

A Not to my recollection. I mean, that's been four years ago. I just don't remember everything, but I do not recall any written instructions on how to draw the two districts you had in mind either directly or indirectly via email.

Q Okay. And so there was no sort of general guidance, draw CD 1 as a majority-black district or let's talk about politics with respect to CD 12? Nothing like that we're going to find in your emails?

A To the best of my recollection, yes.

Q All right. So you were – did you receive instructions –

JUDGE OSTEEN: Hold on. To the best of your recollection, the "yes" means you agree with Mr. Hamilton that will not be in your email?

THE WITNESS: To the best of my recollection, it will not be in my emails, yes, Your Honor.

JUDGE OSTEEN: I wasn't sure what the "yes" meant in response to the question. You may continue.

THE WITNESS: I'm sorry, I apologize.

BY MR. HAMILTON:

Q Were you told to restrict your communications to verbal instructions only with respect to CD 1 and CD 12?

A As a general rule in redistricting, also in some cases in [603] life in general, I think a person needs to be pretty circumspect about what they email. I have general instruction material that I do for people in redistricting and explain to them that emails are forever, and you really should be very circumspect about what you send. Is that responsive to your question?

Q Sure.

A Okay.

Q And "emails are forever," meaning they can be – they can be requested in discovery if things go south and there's litigation, correct?

MR. FARR: Objection to the form of the question, Your Honor.

JUDGE OSTEEN: No, he can ask what he meant by the response.

BY MR. HAMILTON:

Q What do you mean by "emails are forever"?

A I mean that generally they are resident on your computer as long as the disk drive is available.

Q Right, but you're not –

A And we've seen a lot of that in the national news lately.

Q We're not – your concern isn't that your hard drive is going to fill up with email. Your concern when you say "emails are forever" is that the emails might prove what instructions you were given, isn't that true? That's why you tell people [604] don't – be careful with what you send in email?

A Again, I don't quite agree with the premise of your question. I just think that in regard to anything to do with redistricting, as to plans that are being drawn, it's better not to do it via email, yes, because it's there.

Q But what's wrong with it being there, sir?

A Well, because some discussions you may have while you're drafting plans or something that's going on may involve ideas or situations which everybody

agrees later are bad ideas and shouldn't be done, and so it might not be wise to debate all these things over what is in the last analysis of public source.

Q Okay. So you follow – this is, I take it, some general advice you offer to your redistricting clients wherever they might be?

A Yes.

Q And you followed that practice here?

A Yes.

Q To the best of your recollection, there are no written instructions in email or text messages, paper, stone tablets, carrier pigeons, anything; there's just nothing, right?

A I mean, the term "written instructions" is pretty wide and general. I mean, there might be an instruction like when are you going to be ready, could you get ready sooner.

Q Okay.

[605] A But if you're talking about instructions on what to draw and how to draw it, no. I mean, does that answer your question for you?

Q Yeah, I think so.

A Okay.

Q How about – I'm just – now you've raised a question in my mind about whether we're defining instructions differently. How about instructions about the black voting-age population to include or exclude within a particular district? Did you receive those kinds of instructions in any form of writing, including email?

A No.

Q Now, one of the things that Senator Rucho and Representative Lewis instructed you to do was to, quote, avoid setting a racial quota, closed quote, right?

A Again, I'd have to say what was the context of the use of the term "racial quota"?

Q Well, it's in your second report, which is Exhibit D26.1?

A Okay.

Q Do you have it there in front of you?

A I do.

Q Let me direct your attention to paragraph 32 and specifically line 12, and I'll read it, and you tell me if I've read it correctly. It starts with the words "this, of course, would." Do you see that? It's exhibit –

[606] A I'm on page 12.

Q Of D26.1, page 12, paragraph 32, line 12, far right-hand side.

A I got it, I'm sorry.

Q Quote, this, of course, would have been setting a racial quota, a process which the drafters of the new map were instructed to avoid by the chairman of the General Assembly's Redistricting Committee, closed quote. Did I read that correctly?

A Yes.

Q Does that refresh your recollection that you were instructed to avoid setting a racial quota?

A Okay. If I may, if I could read the entire paragraph and understand the context of it?

Q Sure.

A Okay. If I might say, this is with regard to the 12th District?

Q That's fine.

A Okay.

Q But you were instructed to avoid setting a racial quota, correct?

A I was instructed not to use race at all in the construction of that district.

Q Well, sir, that's not what you said in paragraph 32. And the question I have for you with respect to paragraph 32 is you [607] were – you said, "This, of course, would have been setting a racial quota, a process which the drafters of the new map were instructed to avoid by the chairman of the General Assembly's Redistricting Committee." That's what you wrote in your report, right?

A I did, and that was my understanding of what the instructions meant to me.

Q Okay.

A And, that is, to have set a number would be analogous to having a bright line, and there was no bright line. There was not any line.

Q And those are the instructions you received?

A My instructions were to draw the district as a political district.

Q I'm sorry, sir. The instructions you received were to – in part, were to avoid setting a racial quota?

A I don't believe I said that those were the instructions I received was not to set a racial quota.

Q Well, then what –

A I believe that – if a racial quota – if I had set a racial quota in my mind, that that would have been in violation of the instructions to use race in the drawing of District 12.

Q Well, let's just return to line 12.

A Okay.

Q Paragraph 32, "this would have been setting a racial [608] quota, a process which the drafters of the new map were instructed to avoid" – now, maybe I stop there. Maybe this is the problem. The drafters of the new map, that's you, right, because you're drafting this map?

A Yes.

Q And when we say "were instructed to avoid by," the person who is giving the instructions are the chairman of the General Assembly's Redistrict-ing Committee. That's Senator Rucho and Representative Lewis, correct?

A Well, perhaps I didn't state that sentence as artfully as I might have. I was given instructions to not use race. That was a political district, and it was a political draw.

Q Okay.

A And a quota would be using race.

Q I guess –

A I just want to continue to say, nobody every mentioned the word "quota" to me. Senator Rucho or Representative Lewis, they didn't use the word "quota."

Q Okay. So the instructions that are described in 32, paragraph 32 of your report, you didn't receive

those? You didn't receive – you weren't instructed to avoid a racial quota?

A I was instructed to use race in any form except perhaps with regard to Guilford County.

Q Now, we can't actually test that because we don't actually [609] have the instructions you received. Those must have been in person or by telephone, right? They weren't in any email or document?

A I think – I've stated many, many times that District 12 in 1997 was justified and accepted as a politically drawn district. It was drawn as a political district in 2001, and the instructions were to treat it in the same manner as it was treated two times before. The only difference is the politics of the district were going to be different because the policy – the political policy goals of the Republican majority were different than the political policy goals of the Democratic majority in the previous redistricting.

Q Understood, but that, of course, was not an answer to the question that I asked you. So let me ask it again.

You understood from your instructions that use of a racial quota would be improper in any context? Whether it's CD 12 or any other district, a racial quota is inappropriate, isn't that true?

A In that district, yes.

Q In any district, using a fixed numerical racial quota is illegal; you know that?

MR. FARR: Objection, Your Honor. I thought he wasn't a legal expert.

JUDGE COGBURN: If he knows.

JUDGE OSTEEN: Yeah. I'll let him answer to the [610] extent of his understanding with the caveat he's not an expert.

BY MR. HAMILTON:

Q Can you answer the question, sir?

A The answer to your question is with regard to North Carolina District 1 and District 12, the instruction was to draw District 1 with a black VAP level of 50 percent or more. The instructions for District 12 was to treat it as a political district.

Q You're understanding – you've drawn maps in states all across the United States, right? Been involved probably in redistricting probably longer than I've been alive. You have a pretty good understanding of –

A Are you over 50?

Q You have a pretty good understanding of what's permissible and what's not permissible in drawing maps in redistricting?

A Well, what's permissible and not permissible is in a constant state of evolution.

Q Okay. Fair enough.

A Okay. So I try and keep abreast of it because I'm not a lawyer.

Q Fair enough. I think we've established that. As we sit here today, you know, that, for example, using a 55 percent fixed numerical percentage of black voting-age population would be improper, isn't it true?

A Again, you're asking me to draw a legal conclusion. I [611] think perhaps after some of the cases that are ongoing come to their ultimate conclusion, that might be different.

Q But you don't know right now? As you sit here today, you don't know whether using a 55 percent black voting-age threshold to create a district would be proper or improper? You don't know; the law is in a state of flux?

MR. FARR: Your Honor, this is an argument over the law between the lawyer and the witness.

JUDGE OSTEEN: Yeah, he said he doesn't know. Let's move on, Mr. Hamilton.

MR. HAMILTON: All right.

BY MR. HAMILTON:

Q At the end of this process, sir, you never appeared before the General Assembly to explain the methodology you used to draw the maps, correct?

A Yes. Yes, you're correct, I did not appear.

Q And you never appeared in any forum to allow the membership of the General Assembly as a whole to ask you questions about the maps?

A That's true.

Q Never appeared before the Democratic Caucus?

A I did not.

Q Never appeared before the Black Caucus to describe your maps and how you drew them?

A I did not.

[612] Q Didn't meet with Representative Butterfield?

A I did not.

Q Didn't meet with Representative Watt?

A I did not.

Q And you certainly never released a public statement saying that either of these districts were political gerrymanders designed to benefit Republicans and disadvantage Democrats, right?

A I'll answer that yes, but I would like to clarify that by saying that it never would have been my job as a redistricting consultant to the two chairmen of the respective committees to explain or speak for the map. It was their map that they were presenting for approval to the legislature, and it would have been their job to explain the map, not mine.

Q Okay. Fair enough.

A I don't know in any circumstance in any state with partisan map drawing where a line-drawing consultant, or even many experts, would be asked to get up and explain the map to a legislative body as a surrogate for the legislative leadership. It would be kind of incomprehensible to me.

Q So the answer is you never released a public statement; it's not your job to do that?

A That's right.

Q Okay. And you never said it publicly in a speech or other public statement not in writing that this was a political [613] gerrymander designed to advantage Republicans and disadvantage Democrats?

A You mean after the fact, after it was –

Q No, at the time the legislature was considering this?

A While they were considering it?

Q Um-hum.

A No.

Q Never said that in an email?

A Not that I can recollect.

Q So in all this discussion about the political goals of the map, the General Assembly, as a whole, never heard that explanation, at least from you, at the time they adopted this map?

A Not from me.

Q Neither did the Democratic Caucus; they never heard it from you either, did they?

A No.

Q And neither did the Black Caucus?

A No.

Q Now, let's talk a little bit about the specific instructions you received from Senator Rucho and Representative Lewis. They told you to draw the map in such a way as to pass muster under both Section 2 and Section 5 of the Voting Rights Act, correct?

A That was one of the criteria that they enunciated, yes.

[614] Q And you knew it was an important criteria?

A Of course.

Q And you knew that the Voting Rights Act would be an issue in drawing at least some of the districts in North Carolina this cycle?

A Well, it'd certainly be an issue because it had to be precleared under Section 5.

Q Right. And there were at least 40 counties in North Carolina that are covered by – that at the time were covered by Section 5, correct?

A Yes.

Q So in order to comply with Section 5 of the Voting Rights Act, you have to make sure there's no retrogression in those covered counties, is that right?

A It would be wise to avoid a retrogression, although I think when you talk about retrogression of a voting rights district, you're talking really about retrogression of the district. I mean, just as a hypothesis, if you're drawing a map and you're drawing a minority district, it may actually move out of one county and into another county. So you're looking at retrogression of the district.

Q Okay. Fair enough. But the key in – the key question is whether the minority community has the ability to elect and whether the drawing of the district has retrogressed, or impaired, the ability of the minority community to elect the [615] candidate of its choice. Isn't that the test under Section 5? MR. FARR: Objection.

MR. HAMILTON: Your Honor, he received instructions to avoid this very problem. If he doesn't understand it and he doesn't know, then he can say that. I'm not examining him –

JUDGE OSTEEN: Well, let's take him through step by step. He received instructions, but if you want to go specifically through what the instructions were or what his conclusions were and so on – but it seems to me you've gone from that instruction directly to what's his opinion on what Section 5 requires, which takes us immediately into a legal conclusion. So let's rephrase the question.

MR. HAMILTON: I will.

BY MR. HAMILTON:

Q Let me back up. You received instructions to comply with the Voting Rights Act, and specifically

with Section 5 of the Voting Rights Act, in drawing these districts, correct?

A I received an instruction that said because of the fact that District 1 was a voting rights district, it had been from its very inception from the '90s on, because of the Voting Rights Act, it was to be drawn at 50 percent plus.

Q And did you understand what the term "retrogression" meant?

A Well, sometimes it means different things to different people in different concepts, but my –

[616] Q Did you – I'm sorry.

A I'm sorry. But my general academic view of it is is the minority ability to elect the preferred candidate of their choice enhanced or made less.

Q Right. So it would be in your understanding – just asking you to elaborate on that a little bit. If the ability to elect is impaired, then your understanding is there would be retrogression?

A Yes, but, then again, I'm not deciding a legal case. I didn't have to decide with regard to District 1 exactly what that meant because the instruction was very clear as to what was required both racially and politically on that district.

Q Let me direct you to the tab in the witness notebook in front of you with your name on it, and it's the tab marked Tab 700, and it's an excerpt from the Federal Register. I just want to know if you – you mentioned a moment ago that different people interpret retrogression in different ways, and I'm wondering have you ever seen the Department of Justice's guidance on retrogression under Section 5

that was issued in connection with this redistricting cycle? Did you see this?

A I indeed did see it, yes.

Q Okay. So let's – and you reviewed it in connection with drawing these maps?

A I would say I would be more apt to say I reviewed it in general with drawing maps all over the country.

[617] Q So let me direct your attention to page 7471, which is on the third page of this document?

A I'm there.

Q Okay. And at the right-hand column, I'm going to read it and ask if you noticed – if you read this part of the guidance, quote:

A proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters' effective exercise of the electoral franchise when you compare it to the benchmark plan." And then it cites a Supreme Court case.

"In 2006, Congress clarified that that means the jurisdiction must establish that its proposed redistricting plan will not have the effect of diminishing the ability of any citizen of the United States because of race, color, or membership in a language minority group defined in the Act to elect their preferred candidate of choice, closed quote.

You saw that?

A I did.

Q And you understood that the ability to elect was important to that analysis? That's consistently your understanding?

A That's what the Justice Department says is required.

Q Okay. So let's look on a little bit further in this guidance, the next full paragraph starting with "in determining," far right column, same page, 7471:

"In determining whether the ability to elect exists [618] in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district, closed quote.

Did I read that correctly?

A Yes.

Q And that's also consistent with your understanding, isn't it?

A Well, it's what the Justice Department has said that is required.

Q And you were certainly aware that at least the Justice Department believes that a functional analysis was important in determining whether a plan is retrogressive?

A That's what they say, yes.

Q Okay. And then one last piece of this, and then we'll move on. In the lower right-hand corner, far right column, page 7471, words begin "therefore":

"Therefore, election history and voting patterns within the jurisdiction, voter registration, and turnout information and other similar information are very important to the assessment of the actual effect of a redistricting plan, closed quote.

[619] Do you see that?

A I do.

Q And that's consistent with your understanding of the Justice Department's view of retrogression?

A I'm certainly not going to argue with the Justice Department about what they say, yes.

Q And it's consistent with your understanding of their position?

A That's true, yes.

Q And it doesn't really matter what attributes there are to a map if it doesn't get precleared. That's sort of a pretty important part or was a pretty important part of adopting a redistricting map that's in a covered jurisdiction, correct?

A Well, yes, if the plan doesn't get precleared, you're going to have to redraw it or litigate it.

Q Now, the map – your map – the maps that were drawn here, Section 1 and Section 12, they were both precleared, correct?

A Yes.

Q So there was no problem, at least from the Justice Department's point of view, with preclearance, right?

A That's true.

Q You weren't surprised by that decision, were you?

A No.

Q I mean, in fact, the black voting-age population in CD 1 increased rather than holding steady or decreased, so there [620] really was no question that there was going to be preclearance, correct?

A That would have been my understanding, but, you know, with the Justice Department, you never know.

Q Now, with respect to Section 2, it was your understanding that the 1st Congressional District was to be known as a Voting Rights Act district, correct?

A Once again, my instructions from the chairman of the two committees was because of the Voting Rights Act and because of the *Strickland* decision that the district had to be drawn at above 50 percent.

Q Okay.

A I didn't really have to interpret in that case, and I would have left that interpretation up to the attorneys involved. As it turns out, it's my understanding they were advising the chairman of the committee.

Q Sure. And whatever that discussion was, it filtered back to you with the express instruction you have to draw CD 1 as 50 percent black voting-age population plus one?

A That was my instruction.

Q And there were no – there's no question about that here; you had to consider the race of the population as you were moving – you were drawing the lines of CD 1, moving population in, moving population out. You had to be looking at the race of the voters in order to do that because that's the only way [621] you can make sure that you were going to get the 50 percent plus one, right?

A Well, if you add 97,000 people to the district, which is underpopulated, and you add areas in that are not large enough and you take areas out that are high enough in percentage and you take areas out that

are very low in percentage, you have to make sure that in the end it all adds up correctly, yes.

Q And when you say "adds up correctly," you mean adds up by the racial totals, black, white, and whatever other category?

A Well, the percentage total, yes.

Q Percentage totals?

A Yes.

Q So just to be clear, and then I'll move on, you did, in fact, consider race in drawing CD 1?

A Yes, but I also considered many other factors, too.

Q Fair enough. But to achieve the 50 percent black voting-age population for CD 1, you had to either move black voting-age population into CD 1 or white voting-age population out in order to achieve that 50 percent total. No other way to do it, right?

A Well, the net result had to be 50 percent.

Q Now, the instructions you received didn't give you discretion, well, you know, if you feel like it or as long as it's consistent with other goals to get to 50 percent .1, or plus one, it was this is – this is what's going to be – it [622] has to be at least 50 percent plus one, and then, beyond that, you can go up one if you want, true?

A I don't think I would characterize it quite that way. I can go as high as I want.

Q Okay. But the – okay. Well, then, you had to be – but it's – the instructions you received was it had to be

50 percent black voting-age population plus one and – period, regardless of any other goals you might have?

A Well, I certainly didn't interpret it that it had to be exactly 50 percent plus one, if I understand your question correctly.

Q And I'm not trying to play games here, but it had to be – it had – the floor was 50 percent plus one, and then it had to be in some range – reasonable range right above that?

A Yes, but there were no limits on that range.

Q Okay. All right. Fair enough. But there was a limit on the range going down? It had to be 50 percent plus one; it couldn't be anything less than that?

A That's correct.

Q Regardless of any other –

A But there are many ways that that district could have been drawn to achieve that.

Q Sure, but the one nonnegotiable one – the criteria was it had to be 50 percent black voting-age population plus one in addition, of course, to –

[623]MR. FARR: Objection –

THE WITNESS: I'm sorry.

MR. FARR: – to the term "nonnegotiable."

JUDGE OSTEEN: All right. I'll allow it. We understand your point. You can move on.

MR. HAMILTON: Okay.

THE WITNESS: Am I answering the question?

BY MR. HAMILTON:

Q No, you don't need to.

A Okay. Thank you.

Q Let's turn to Plaintiff's Exhibit 11, and it's behind – it's in the notebook in front of you behind the Tab 11. Do you see that?

A Yes.

Q Now, this is an email from you to Joel Raupe, is that right?

A Yes.

Q Am I pronouncing the name correctly?

A Yes.

Q Who is Joel Raupe?

A Joel Raupe was retained, I believe, by the legislature to give general assistance to plan drafting and analysis.

Q And is he a lawyer?

A No.

Q So he's another redistricting consultant that does the [624] same sort of thing that you do?

A I wouldn't say he does the same thing I do.

Q I'm sure there are very few who do.

A Okay. With regard to this project, he was a minor person.

Q Okay. And so you were emailing him on a Sunday at 5:26 p.m. in June of 2011, attaching a congressional map, is that right?

A Yes. I was essentially – I don't recall completely, but I was probably at that time up north in the DC area, Washington DC area, I'm sorry.

Q And this email, it's from – it says Tom Hofeller-redistricting. We can't see the actual email address

here, but do you know which email address that's from?

A At that point it would have been THofeller@rnchq.org.

Q So that's the one you described a little while ago that you said now it's GOP. This is the earlier version of the same account?

A Yes. It's – actually, both addresses work now, which means I get twice as much junk mail.

Q All right. So in the email you say, quote, here is my latest version of the congressional map. It puts the county back together. It corrects some boundary line errors and smooths out the boundaries of the 1st Congressional District while maintaining its majority African-American status. I hope that the issues on the majority districts in the House plan get [625] resolved," signed Tom.

Is that what you wrote?

A That's right there in my email, yes.

Q And so what we're doing here – when you say "maintaining its majority African-American status," you mean keeping the black voting-age population at 50 percent or higher, correct?

A That would be correct.

Q And why were you sending this to Mr. Raupe?

A I was sending it to Mr. Raupe in case the chairman of the committee wanted to see the map where it was at that time. If we're going to talk about the map, for instance, it's pretty hard for them to talk with me about the map if they can't see the map.

Q Sure. Fair enough.

A Okay.

Q You're familiar with the concept of traditional redistricting principles?

A I am.

Q And keeping existing precincts intact is a traditional redistricting principle, no? Isn't it?

A It's described that way by some, yes.

Q So is respecting – well, let me ask you: What do you mean by "it's described by some"? You don't consider keeping existing precincts intact as a traditional redistricting principle?

[626] A I think, all things considered, it's probably better to split less precincts; but, remember, a precinct is an administrative unit, and one of the problems that we have in North Carolina – I can say "we" because I live here now – is the precincts are very large and, in some cases, very irregularly shaped, and in many cases, their boundaries don't follow community-of-interest lines of any sort. There's one, for instance, in Lee County that I think has 17,000 people in it, and it goes a long way.

So some states' precincts or, as we call them sometimes, VTDs are much easier to deal with than other states' VTDs because of the way the policies that the different counties or states have in drawing them. I wouldn't rate that high on the list of established redistricting principles, and, in fact, that hasn't always been the case in North Carolina.

Q Okay. How about respect for county lines? That's a traditional redistricting criteria, isn't it?

A It is.

Q Now, because CD 1 was treated as a Voting Rights Act district, you sometimes treated traditional

redistricting criteria a secondary importance when drawing the map, correct?

A Sometimes it wasn't possible to adhere to some of the traditional redistricting criteria in the creation of the district, and the more important thing was to make a district which would achieve preclearance and follow the instructions [627] that I had been given by the two chairmen.

MR. HAMILTON: Your Honor, may I approach the easel?

BY MR. HAMILTON:

Q All right. Let me direct your attention to Exhibit 67. It's in the notebook in front of you behind the tab numbered 67, and if I could have Ms. Herring put that up on the screens. Let me direct your attention to page 7 and specifically paragraph 7 of this exhibit. Tell me when you're there.

Did you find where we are, Dr. Hofeller?

A Yes. I'm reading it.

Q Oh, okay.

A Okay.

Q So in the last part of this paragraph – well, first of all, what is this document?

A This is a public statement issued by Senator Rucho and Representative Lewis regarding the proposed Congressional map released, I guess, around July 1, 2011.

Q Did you assist in putting this together?

A No.

Q So this would be the sort of statement that was issued to the General Assembly at the time the

redistricting plans were put before the General Assembly?

A Well, again, I think you would have to talk to them. I think their purpose was just to make a public statement. So certainly the members of the General Assembly would have this. [628] I'm not sure it was designed specifically for them. I think it was a general public statement.

Q You've seen this before?

A Before today?

Q Yes.

A Yes.

Q Okay. So let's start with paragraph 7 in which Senator

Rucho and Representative Lewis are talking about whole counties and whole precincts. Do you see that?

A I do.

Q And the last sentence there: "Most of our" – well, actually, let me – I'll just read the whole paragraph:

"Counties and precincts are two specific examples of communities of interest. Like other interests, they must be balanced. We've attempted to respect county lines and whole precincts when it was logical to do so and consistent with other relevant factors. Our plans include 65 whole counties. Most of our precinct divisions were prompted by the creation of Congressman Butterfield's majority-black 1st Congressional District or when precincts needed to be divided for compliance with the one-person, one-vote requirement."

Do you see that?

A I do.

Q So when it was necessary to split precincts in CD 1 in order to draw a majority-black voting age population, they were [629] split, true, when it was necessary?

A Again, I'm not quite sure on the chronology of this statement, how it relates to the release of which map. I can tell you that Congressman Butterfield objected to the first congressional plan that was released.

Q But that's not my question, sir. My question is –

MR. FARR: Can he answer his question, Your Honor?

JUDGE OSTEEN: Yeah, let him –

MR. HAMILTON: Your Honor, he's not answering the question. I am trying to be –

MR. FARR: Yes, he is.

JUDGE OSTEEN: I think he's explaining his answer. So let's go back. The question – well, state the question again, and then if you can answer the question yes or no, do so, and then you may explain your answer.

BY MR. HAMILTON:

Q So when it was necessary to split precincts to draw Congressional District 1 with a majority black voting-age population, they were split, isn't that true?

A That would be one reason, yes.

Q And the same thing was true for the counties? When it was necessary to split a county in order to achieve a 50 percent plus one black voting-age population in CD 1, they were split?

A Yes, but I could give a better, more complete answer if I understood the chronology of and the relationship of this [630] particular document to the release of which plan.

Q Okay. Let me direct your attention to page 1 of this document.

A Okay.

Q Second paragraph, first page: "Today, we are pleased to release our proposed 2011 congressional plan, closed quote.

Does that help establish the chronology that this was a statement issued by Senator Rucho and Representative Lewis on the day that they released the congressional plan?

A I understand the day when it was released. I don't recall, five years later, whether that was the statement in the release, and with regard to the release, the first plan or the second plan.

Q All right. Now, there's nowhere in this statement, is there, where Senator Rucho or Representative Lewis explained that this is a political gerrymander designed to assist Republican candidates and disadvantage Democratic candidates? They don't say that in here anywhere, do they?

A You know, I'd have to read the whole statement to know that for sure, but –

Q Well –

A – I would say from my experience that public statements that are made on redistricting plans sometimes do not state political goals because the politicians don't want to state them publicly.

[631] Q I see.

A I think everybody – from my knowledge and everything that I heard and saw, everybody understood in the state, Republicans and Democrats, that since Republicans were drawing the map, the Republicans would be drawing the map to the advantage of Republican candidates and incumbents.

Q Well, that's not, of course, what this statement says, is it?

A No.

Q Okay. Let's look at what it actually says. From the very beginning – the first sentence: "From the beginning, our goal has remained the same: The development of fair and legal congressional and legislative districts, closed quote.

Do you see that?

A Yes.

Q And then there is a discussion at the very end of the document about creating more competitive districts, page 7, but down at the bottom of the page now.

A Um-hum.

Q And it says: "The federal and state constitutions allow legislatures to consider partisan impacts in making congressional redistricting decisions. While we have not been ignorant of the partisan impacts of the districts we have created, we have focused on ensuring that the districts will be more competitive than the districts created by the 2001 [632] legislature. Along those lines, we wish to highlight several important facts. First, in 12 of our proposed 13 districts in the 2008 General Election, more voters voted for Democratic candidates for attorney general,

Roy Cooper, than those who voted for the Republican candidate.

"Second, registered Democrats outnumber registered Republicans in 10 of our proposed 13 districts. And, finally, the combination of registered Democrats plus unaffiliated voters constitutes very significant majorities in all 13 districts, closed quote.

Did I read that correctly?

A Yes.

Q There's nothing in there about a partisan gerrymander designed to assist Republican candidates and disadvantage Democratic candidates, isn't that right?

A That's true, but I think that everybody, again, reading it would know that the vote for Democratic Attorney General Candidate Roy Cooper was an extremely high victory margin, and also talking about registration is not talking about expected election outcomes. That's precisely why we don't use them in drawing plans.

Q Sure, but in putting together this statement and issuing it for the consideration of the General Assembly in assessing the plan they were releasing, this is what they said. They didn't say anything about not using voter registration or the [633] extremely high turnout or – they simply said nothing of the sort.

A No, it was just a public statement.

Q Just a public statement –

A Yes.

Q – for consideration by the General Assembly in considering its plan?

A To take it as they understood it.

MR. HAMILTON: Your Honor, I'm about to switch topics. I'm happy to continue, but it's 12:30.

JUDGE OSTEEN: How much longer do you think you have?

MR. HAMILTON: Probably another hour.

JUDGE COGBURN: Are we going to get through today?

MR. HAMILTON: Oh, absolutely.

MR. FARR: Your Honor, we're going to have to have some redirect on this witness, and we have two more witnesses.

MR. HAMILTON: I can go through at lunchtime and see what I can do to shorten it up.

JUDGE OSTEEN: If you'll use your lunch to make the examination more compact by way of a Reock – I can't even pronounce the word right now. If you'll use it to make it more compact – how about we stick to maybe 45 minutes for lunch. All right. Let's take a 45-minute lunch recess.

(At 12:36 p.m., break taken.)

(At 1:20 p.m., break concluded.)

[634] JUDGE OSTEEN: All right. A couple quick housekeeping matters. Because we have law clerks over here, today I'm going to ask all the spectators to stay around in the back part of the gallery. I don't anticipate – ordinarily, that part is open, but it's a little different seating arrangements, so stay around to that side.

In anticipation of the fact that it may look like a four-alarm fire drill when we end this case and everybody leaves, in case I forget, to allow for the preparation of an expedited transcript, which we think

will be done and completed on Monday, we're going to extend the findings of fact deadline to the following Monday. We're going to give an extra three days to allow for preparation of that transcript.

MR. HAMILTON: Thank you, Your Honor.

JUDGE OSTEEN: So I would say, unless something changes, proposed findings of fact and conclusions of law – and, frankly, if you're going to get a transcript, I would like citations in the findings of fact so we know where in the record to go. That will be due Monday, if my math is correct, October 26 by 5:00.

MR. SPEAS: Your Honor, if I may raise one more housekeeping matter? We've been keeping up with the time, and our understanding was that the time would be divided equally. Assuming six-hour court days, the defendants have exceeded their time at this point. We just wanted to bring that to the [635] Court's attention.

JUDGE OSTEEN: When did you all start yesterday? About 11?

MR. FARR: Yes, Your Honor. I mean, I didn't know that anyone was keeping track of it. We certainly didn't hear that from the Court.

JUDGE OSTEEN: Well, yeah, that's an agreement between the parties. We did – the anticipation was, certainly as expressed, that the time would be divided equally.

With cross-examination, I mean, it's – if we're going to get through today, then everything is going to have to be shrunk or compacted from here on out to move through. This is not a jury trial. All of the judges up here know how to find facts, listen to the evidence, and draw reasonable conclusions; and these two can get it on one try, and I guarantee you I can get it without

having heard it twice. So let's remember that and keep on moving for the rest of the time. We'll just do the best we can.

At this point, I will say, Mr. Speas, I don't have any sense that the defendants have – by comparison, that the defendants have unfairly prolonged their part, but if everybody can keep moving –

MR. SPEAS: I just note for the record that by our records, they have – we have used 6 hours and 54 minutes. They have used 9 hours and 24 minutes.

* * *

[637] MR. FARR: For what year is that?

MR. HAMILTON: I just randomly picked one as 1998.

THE WITNESS: Okay, well, yes, it's 46.54.

BY MR. HAMILTON:

Q And, yet, Eva Clayton, the African-American candidate of choice, received 62.24 percent of the vote, correct?

A That's correct.

Q So we don't need to do a lot of fancy calculations here to understand that there was a significant number of white voters who crossed over and voted with the African-American community in order to yield that kind of a winning percentage, correct?

MR. FARR: Objection.

THE WITNESS: Yes, we – we don't know precisely – for purposes of analyzing the votes as opposed to drawing a district, I would – it would be interesting to see what the turnout figures were.

BY MR. HAMILTON:

Q Sure, but as a functional or as a practical matter, there was a sufficient number of white voters who voted with the African-American community to elect those candidates by decisive margin in each one of these elections, right?

MR. FARR: Objection, Your Honor. There's no foundation for that.

JUDGE OSTEEN: Well, I'm going to see – I'm going to allow him to answer.

[638] THE WITNESS: I think that even taking into account that there are other races involved, that it was certainly significant number – amount of crossover. Of course, how much you get in the election, too, depends on the candidates that are running and the kind of campaigns they're running and whether it's a serious candidacy, et cetera, but I think that's the case. We just don't know what the turnout was, how many people actually voted and how many people were registered.

BY MR. HAMILTON:

Q Sure. And between 1998, when the plan was – the 1997 plan was first implemented, and the 2012 election, in each of those instances, the black voting-age population was less than 50 percent, isn't that right?

A Between 1998 and 2010, yes.

Q And, yet, in each of those elections, the African-American candidate won?

A Yes, another consideration you would also want to know is what is the percentage of non-Hispanic whites, but, okay, I'll go with that.

Q So by definition, at least in CD 1, there wasn't racially polarized voting in CD 1 sufficient to prevent

the African-American community from electing their candidate of choice. We know that, don't we?

MR. FARR: Objection, Your Honor. There's been no polarization study offered.

[639] JUDGE OSTEEN: Well, he's an expert on – I think it included voter behavior, or something of that effect. So to the extent he can – I'll allow the question to the extent he's able to respond.

THE WITNESS: Again, if you're going to do a polarization study, you might not know what the degree of polarization would be for the ability of black candidates to elect their preferred candidate of choice unless you looked at election and registration data and also if you looked at other races in the area. Again, these are – these are strong Democratic districts, and I don't think they're heavily contested.

BY MR. HAMILTON:

Q Okay. They're strong Democratic districts, not heavily contested with a black voting-age population of less than 50 percent, but, nonetheless, they're able to elect the African-American candidate of choice in every one of those elections between 1998 and 2012?

A Yes, but I'm not sure which – to the extent that the BVAF measures that, the amplitude of it.

Q By the way, as long as we are talking about polarized voting analyses, you didn't do a polarized voting analyses for the General Assembly at the time that you were preparing these maps, correct?

A That's true.

[640] Q And one of the things that happened in CD 1 is that you moved Durham County – or part of Durham County into CD 1 that hadn't been there before, correct?

A I did, and the reason that that was done –

Q Well, I'm just asking whether you did it.

A Okay, but I would like to –

Q And I'll ask you in a sec – the part of Durham County that you moved in was the heavily African-American part of Durham County, isn't that true?

A Well, it had to be.

Q Okay. And *Gingles* said – you were involved in the *Gingles* case, weren't you, sir?

A I was.

Q You were an expert in that case, weren't you?

A I was.

Q And you read the *Gingles* decision?

A A long time ago.

Q But you know that *Gingles* said that there was no racially polarized voting in Durham County? You remember that, don't you, sir?

MR. FARR: Objection, Your Honor. That's not what *Gingles* said.

JUDGE OSTEEN: Well, he's asked what he recalls, so he can answer the question.

THE WITNESS: Again, since I haven't read *Gingles* for [641] a long period of time –

BY MR. HAMILTON:

Q You don't recall?

A Well, I don't recall specifically what the decision said. Is that fair?

Q That's fair. I'm not asking you specifically, but, generally speaking, you have a recollection, don't you,

that *Gingles* said there was no racially polarized voting in Durham County?

MR. FARR: Objection, Your Honor.

JUDGE OSTEEN: If you recall, you can answer.

THE WITNESS: I don't recall enough to state it as a fact, but I think that was generally found, that there wasn't that level of polarization.

BY MR. HAMILTON:

Q Thank you. Now, let's talk about CD 12 for a minute. When you started with drawing CD 12, where did you start? Did you have – did you take up – pull up the old version of CD 12 and overlay that on the screen and then start making changes to it?

A I don't remember specifically, but I'm pretty sure that I actually copied the old version of 12 – well, the whole map –

Q Including –

A – and made a 2011 version.

Q Okay.

[642] A But it was a long road between putting the old 2001 map in there and getting to the point where you had the 2011 map; but, as I stated before, we wanted to keep District 12 in the same area was – primarily because that's what we wanted to do to accomplish our political policy goals with regard to the districting plan.

Q Now, with respect to drawing the 12th Congressional District, Senator Rucho and Representative Lewis expressed some concerns about complying with the Voting Rights Act in that district, isn't that true?

A I don't know. I would have to see the documents where they actually made that expression to see if that was specifically what they said.

Q Well, let's talk generally about what they said. They expressed some concerns about avoiding retrogression under Section 5 and, in particular, in Guilford County, correct?

A Well, I don't see how you can retrogress a political district in terms of the Voting Rights Act. You might encounter a fracturing complaint but not a retrogression complaint.

Q Guilford County was a covered jurisdiction under Section 5 at the time you were drawing these maps, correct?

A Yes.

Q And Guilford County had a substantial number of

African-American population?

[643] A It did.

Q So let's look again at Exhibit 67. Your Honor, if I might remove the easel? Can we display Exhibit 67 on the screen? All right. This is the statement we were looking at a little while ago from Senator Rucho and Representative Lewis, is that right.

A The July 1st statement?

Q Correct.

A Yes.

Q Now, if I could direct your attention to page 5 of this statement. In the middle of the sentence – I mean, in the middle of the paragraph, and I'll read it, it begins, "because of the presence." Do you see that?

A Yes.

Q Quote: Bécause of the presence of Guilford County in the 12th District, we have drawn our proposed 12th District at a black voting-age level that is above the percentage of the black voting-age population found in the current 12th District. We believe that this measure will ensure preclearance of the plan, closed quote.

Did I read that correctly, sir?

A You did read it correctly.

Q And that's a true statement, correct?

A It wasn't as I was instructed to draw the plan, no.

Q You don't have any reason to argue with Senator Rucho or [644] Representative Lewis about what they said in this statement, do you?

A I don't want to be put in the position of arguing with them, but all I can tell you is what my instructions were in drawing the plan, which is not the way the district was drawn. Again, this is a public-facing statement. It's really a political statement.

Q They instructed you to place, quote, substantial African-American population, closed quote, in Guilford County in CD 12, isn't that true?

A My instructions in drawing the 12th District were to draw it as it were a political district, as a whole. We were aware of the fact that Guilford County was a Section 5 county. We were also aware of the fact that the black community in Greensboro had been fractured by the Democrats in the 2001 map to add Democratic strengths to two Democratic districts. During the process, it was my under-standing that we had had a comment made that we might have a

liability for fracturing the African-American community in Guilford County between a Democratic district and a Republican district. When the plan was drawn, I knew where the old 97th, 12th District had been drawn, and I used that as a guide because one of the things we needed to do politically was to reconstruct generally the 97th district; and when we checked it, we found out that we did not have an issue in Guilford County with fracturing the black [645] community.

Q Do you recall your deposition being taken on May 6, 2014?

A I recall giving a deposition. I don't know the date.

Q And do you recall being asked the following question and being – giving the following answer, and this is page 37 of the deposition transcript?

"Question: Did you receive an instruction from Representative Lewis and Senator Rucho to draw the 12th District as a black voting-age level that is above the level – black voting-age level in the current 12th District?

Answer: Actually, my understanding of the issue was because Guilford was a Section 5 county and because there was a substantial African-American population in Guilford County, the portion of the African-American community was in the former District 13 was a strong – which was a strong Democratic district was not attached to another strong Democratic district that it could endanger the plan and make a challenge to the plan."

Do you recall that?

MR. FARR: Your Honor, may I request that the witness be shown his testimony instead of being asked whether he recalled it?

JUDGE OSTEEN: Well, let's see what he says first, [646] and then if he needs to look at it, he can.

THE WITNESS: I would really like to see the context, if I might?

MR. HAMILTON: May I approach?

THE WITNESS: Okay. I've read it.

BY MR. HAMILTON:

Q Does that refresh your recollection that that was your testimony in your deposition?

A Well, I stand by my testimony, but that does not say that the 12th District was to be drawn as if it were a voting rights district or if it were to attain any specific level of black population.

Q Fair enough. You're right; it doesn't say that.

A Could I finish?

MR. HAMILTON: Well, I don't think there's a question pending, Your Honor. I'm happy to allow him, but we're –

JUDGE OSTEEN: Yeah, we want to try to move along, so let's stick to answering the questions, and I think you have. Next question.

BY MR. HAMILTON:

Q In the benchmark plan, Guilford County was split between multiple districts, including CD 12, correct?

A I'm sorry. Could you repeat that?

Q In the benchmark plan, the 2001 Plan, this county,

Guilford County, was already split between districts, including [647] CD 12?

A Yes.

Q And you reunited a portion of Guilford County back into CD 12, correct?

A Yes.

Q Not all of it, just a piece of it?

A That's correct.

Q And the piece of it was the piece with the substantial African-American population. That's the part that got moved into CD 12, correct?

A Yes, but it wasn't moved into CD 12 because it had a substantial black population. It was moved into CD 12 because it had a substantial Democratic political voting record and because I was looking at the old District 97 and those portions had come – were part of the old District 97.

Q And the part without a substantial African-American population, that was the part of Guilford County that was not moved into CD 12, correct?

A Again, I didn't look at the black population while I was drawing it. I was looking at the political data.

Q So Guilford County remains fractured in the enacted plan as well as in the benchmark plan, correct?

A Yes, but my recollection was it was fractured three ways in the 2001 Plan and two ways in the successor 2011 Plan.

Q Okay. Let me back up. At the beginning, when you were [648] starting this process of drawing these maps, you collected some data – or, rather, the State assisted you in collecting some data upon which you would be drawing the map, correct?

A The State produced a database, which was incorporated into their system and our system.

Q And that included the results of past elections and past voter registration, correct?

A Yes.

Q And they were gathering those results to be put into a database that could be used to draw the new maps?

A They had a very large database, yes, which you could choose portions to use and portions not to use.

Q For the purpose of drawing the maps?

A Precisely.

Q And in your view, it was felt that the data is required in order to draw lines and make the evidence – make the decisions that need to be made; that was the standard practice, right?

A You never know while you're drawing a map what information some people may want to know about the map, particularly the incumbent members. And so it's always better to err towards a larger database than you might prefer yourself just to make sure you don't have to go back and catch up on something.

Q Sure. And the data that was collected included voter registration data?

A It did.

* * *

[654] great deal to do with the answers you get.

Q But in the affidavit you filed in the Mississippi redistricting litigation, you yourself relied on the Reock test to measure – to evaluate compactness of a district, isn't that true, sir?

A In the Mississippi case?

Q Yes.

A I don't remember.

MR. HAMILTON: May I approach the witness, Your Honor?

BY MR. HAMILTON:

Q So I've handed you a copy of your deposition taken on August 10, 2012, in the *Dickson* matter. Do you recall being deposed in connection with that matter, sir?

A I'm sorry, could I just familiarize myself with this, please?

Q Sure.

A Okay.

Q Does that refresh your recollection that you used the Reock test in connection with the Mississippi litigation?

A Am I supposed to be reading on page –

Q I'm trying to shortcut this by –

A I told you I honestly don't remember.

Q Okay.

A Okay. I'm sorry.

[655] Q And that's fine, and I don't mean to test your memory. God knows, I've forgotten many things myself, but let's just go through the transcript. It's on

page 251 of the deposition taken August 10, 2012. Question, line 2:

"Question? The other statement that I want to ask you about is in Exhibit 429 in paragraph 5, 6, and 7. You're reporting on compactness scores, is that correct?"

Your answer was "Yes."

Question: And I want to just clarify. I think it's in the context of the affidavit. Is the Reock test the test that you were using to generate those scores?

Answer: I'm not sure I remember which test I used.

Question: Well, if you look at paragraph 4, you're talking about the Reock test.

Answer: Okay. Well, then probably yes.

Question: So the opinions you expressed in this affidavit in the Mississippi case were based on the – on just one compactness test?

Answer: Yes."

Did I read that correctly?

A Yes, but I don't know what the opinions I expressed were, and I don't have the document that I was asked to talk about in [656] the deposition. So I know nothing of the context of this whole matter.

Q You also used the Reock test in the *Bethune* case in your testimony here, didn't you?

A In my testimony?

Q In the *Bethune* case in Virginia?

A In *Bethune*?

Q Yes.

A Yes.

Q So it's – you're familiar with the test, and it's not an illegitimate test to measure compactness? It has its strengths; it has its weaknesses?

A Yes, but I think it would be fair to say that you would have to talk about what I said about using compactness tests in general and in the context of Virginia.

Q You don't – we can go through the actual calculation of the Reock scores, but you don't disagree with Dr. Ansolabehere's calculation of the Reock scores from the North Carolina congressional districts, do you?

A When I calculated the Reock scores, I got the same scores he did. So, obviously, we're in agreement.

Q Okay. And you'll agree with me that both the enacted and the benchmark CD 12 has a miserable Reock score, right? That's how you would describe it?

A Is that what I said?

[657] Q That's what you said in your first report, but I'm asking you today –

A No, I mean, I don't know whether I said miserable or not.

Q All right. Well, let's take –

A I will take your word for it if that's what you say I said.

Q Why don't you take a look at your first report, paragraph 37. It's right in front of you.

A Can you tell me what exhibit that is, please?

Q It should be a loose document.

MR. HAMILTON: May I assist the witness, Your Honor?

JUDGE OSTEEN: Yes.

THE WITNESS: Is that D25A?

BY MR. HAMILTON:

Q Probably.

A Okay. Thank you.

Q Both enacted and benchmark CD 12 have miserable Reock scores, correct?

A Yes, well, the redistricting history of congressional redistricting in North Carolina has a lot of low Reock scores in the districts. And I agree with you, yes, that I said it was a miserable score, both of them.

Q And enacted CD 1 is even less compact than the benchmark CD 1? It dropped?

A In terms of the Reock test, yes.

[658] Q And so is 12; it dropped?

A Yes.

Q So at least in the case of CD 12, you took a district with a miserable Reock score and made it even less compact?

A Marginally, yes.

Q Okay. Just a couple more things. Let's take –

A Can I – I might add to you on that answer that one of the reasons that District 12 has a lower score as it does is because the number of square miles in the district is considerably less, and that impacts a lot on the score.

Q If I can direct your attention in the witness notebook to Dr. Ansolabehere's reports. It's behind

Tab 17 and Tab 18, and they are Plaintiff's Exhibits 17 and 18.

A Yes.

Q You've reviewed these reports before, haven't you?

A Yes.

Q You prepared your own reports in response?

A Yes.

Q You accept the data used by Dr. Ansolabehere in these reports as accurate, isn't that true?

A I do now.

Q You did at the time of your deposition. I assume you still do?

A I don't.

Q You don't accept the data?

[659] A You mean the underlying data or the –

Q Correct, the underlying data.

A The underlying data – well, we're all operating off the same database and same geographic files, yes.

Q And recognizing that you disagree with Dr. Ansolabehere's conclusions, you accept that he correctly performed the analyses that he set out to do in his report, right?

A Well, I've looked and since then I've changed my mind about this ratio-of-area-to-perimeter district. On the face of it, it's totally illogical.

Q Let's put that one aside. Other than that –

A Okay.

Q – you accept that Dr. Ansolabehere correctly performed the analyses set out in his reports, right?

A He made the calculations, yes. I already stated earlier today that in his envelope analysis, he used a larger envelope for – well, he didn't use the envelopes for the districts. He combined the two envelopes which biased the scores.

Q Let's look at tables in Exhibit 17. Page 22 is where the tables start. Putting aside the area – the ratio-of-area-to-perimeter test, because I know you have a concern about those, putting those aside, none of the data in these tables are inaccurate in your judgment?

A Once again, I have to say that as he constructed the envelope, the data that he gave for the envelope is correct. [660] What I question is what he used for the envelope.

Q All right. Fair enough. And if you take a look at the maps attached to Exhibit 17, and I believe they start on page 26 of Dr. Ansolabehere's report, you agree that those maps accurately depict what they purport to depict? No challenge on that score, right?

A I think that's true, yes. They would be much better maps if they were colored actually.

Q Okay. Let's look at the rebuttal report, and, again, it's at the very end. It's, I think, the second to the last page. There's a data in those reports.

JUDGE OSTEEN: You switched to P18?

MR. HAMILTON: Say again?

JUDGE OSTEEN: You switched to –

MR. HAMILTON: This is Plaintiff's Exhibit 18 on page 18.

BY MR. HAMILTON:

Q Those tables, one and two – the data in the tables are accurate, as far as you know?

A No.

Q You have a concern about those?

A Yes, I don't think his correlations are correct. I was not able to replicate his correlations.

Q You didn't do any correlation analysis in either of your reports, did you?

[661] A No, but that's not what you asked me.

Q All right. One more thing here, sir, just to finish up.

MR. HAMILTON: May I approach the witness, Your Honor?

BY MR. HAMILTON:

Q I'm handing you a copy of your deposition, and this is the deposition of September 8 – I'm sorry, September 9, 2015, in this matter. This is the one that you probably heard us talking about a little earlier this morning. The question actually begins on page 21 at the bottom of the page, and the question was:

Question: By contrast, did you use that data to draw Congressional District 1, the voting-age population, by race?

Answer: To some extent, yes."

Next question –

A I'm sorry, I need to – okay, yes.

Q Next question, we're on page 22, line 4:

Question: Did you also use the Obama 2008 election results in drawing Congressional 1?"

Your answer was: "To some extent."

Question: Did you use any other election results in drawing Congressional District 1?

Answer: There were none others on the screen.

Question: And the same is true with respect to [662] Congressional 12? There were no other results other than Obama 2008?

Answer: You can only have one on the screen at a time."

And then skipping down to line 24 –

JUDGE COGBURN: Are you going to ask if those were his answers?

BY MR. HAMILTON:

Q Were those your answers, sir?

A Yes.

Q Line 24, page 22:

Question: The only election results you utilized in drawing Congressional 12 were the 2008 Obama election results?

Answer: That's correct."

Was that your testimony, sir?

A Yes.

MR. HAMILTON: No further questions, Your Honor.

JUDGE OSTEEN: Redirect?

MR. FARR: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. FARR:

Q Dr. Hofeller, would you turn to this white witness notebook that counsel for the plaintiffs gave you and turn to I believe it's Plaintiff's Exhibit 700. It's the Department of [663] Justice regulations for Section 5.

A Yes, I have it.

Q Okay. I want you to turn to page 7472.

A Yes.

Q Okay. Do you see in the middle column it talks about the use of 2010 Census data?

A Yes.

Q And could you just read the first sentence into the record there.

A "The most current population data are used to measure both the benchmark plan and the proposed redistricting plan."

Q Okay.

MR. FARR: Now, I have a few questions about that, Your Honor, if I might approach the witness and use the charts the plaintiffs used. And could we please ask for the screen shot to be taken down.

JUDGE OSTEEN: The what?

MR. FARR: The screen shot. I don't need that.

JUDGE COGBURN: That's all we were looking at.

BY MR. FARR:

Q Okay. I want to look at these two charts that plaintiffs' counsel showed you, Dr. Hofeller, if I don't break everything. We're going to start with the 1st Congressional District election results that plaintiffs' counsel went over with you, and what they have listed here is in this column BVAP. Do you [664] see that?

A Yes.

Q Now, do you know whether or not the BVAP that they had listed here is single race black voting-age population or any part black or total black voting-age population?

A Actually, I believe I asked counsel that, and he said it was any part black.

Q So you recall him telling you that from 2002 through 2010 47.76 – he represented to you that was any part black voting-age population?

A Yes, but actually the 47.76 is only a snapshot in time in the year 2000.

Q Okay. But my question is, other than what plaintiffs' counsel represented to you, do you know if that's single race voting-age population or any part black voting-age population? Do you have knowledge whether that's true or not?

A I have no knowledge except for what the counsel from – that the plaintiffs' counsel told me.

Q Okay. And do you know whether or not 47.76 percent they listed for the 2010 election, is that for the 2000 Census or 2010 Census? Do you know?

A No

Q Ok .y. He didn't tell you which census it was from, did he?

A That's true.

[665] Q But your recollection is he represented that 47.76 was any part black voting-age population?

A Yes.

Q Okay. And he also represented for 2012 that the percentage he's listed was any part black voting-age population from the 2010 Census?

A Yes.

Q Okay. All right. And from 2002 to 2010, we're talking about the 2001 version of the 1st District?

A That's correct.

Q From 2012, we're talking about the 2011 version of the 1st District?

A Correct.

Q All right. Now, on the percent of the vote, did counsel disclose to you the actual margin of victory?

A No.

Q Okay. Did counsel disclose to you whether or not the margin of victory was less or greater than the amount by which the 1st District was underpopulated –

JUDGE OSTEEN: Okay, Mr. Farr, counsel at this point is not on trial. The question is what do those statistics mean.

MR. FARR: Okay. Let me –

JUDGE OSTEEN: I think you can ask the same question.

MR. FARR: Let me see if I can ask it another way.

[666] BY MR. FARR:

Q Does this chart, Dr. Hofeller, reveal the actual margin of victory in these elections by how many votes the candidates received?

A None of the absolute numerical votes are on the chart.

Q Okay. And from this column percent of vote, can you determine whether or not the actual margin of victory for the candidate was greater or less than the amount by which the district was underpopulated?

A No.

Q Does this chart tell you anything about white turnout?

A Doesn't tell me about any turnout.

Q Black or white?

A That's true.

Q And does this chart tell you anything about how much money was spent by the candidates in any of these elections?

A No.

Q All right. Same series of questions about this chart, which –

MR. FARR: Your Honor, this has not been marked as an exhibit. I don't know if it should be or not.

JUDGE OSTEEN: Is it one of the stipulated exhibits that's been sitting up over there, I think, the whole case? Do you want to mark it?

MR. FARR: I don't know. Is that an exhibit in –

[667] MR. HAMILTON: We're having them mark the copy that is in the Court's notebook. We don't need to put these giant poster boards in. It's exactly the same thing.

MR. FARR: Okay. That would be fine.

JUDGE OSTEEN: Are both – one of them is at 1 and one is at 12? Yeah, okay. So the chart you were just referring to with respect to CD 1 is an enlargement of the chart found at Plaintiff's Exhibit 1, and the chart

you're now referring to is an enlargement of the exhibit found at Plaintiff's Exhibit 12. Is that right?

MR. FARR: Okay.

MR. HAMILTON: In fact, I – I'm sorry for the confusion.

JUDGE OSTEEN: We'll go on the numbers again.

MR. HAMILTON: I don't think the numbering is right, so I think we should just assign these two documents completely new numbers at 500 and 501, or something, just to make it clear.

JUDGE OSTEEN: Are you good with that?

MR. FARR: I would be fine if we could say that the chart on the 1st Congressional District is Plaintiff's Exhibit 500 and the chart on the 12th District is Plaintiff's Exhibit 501. That would be fine.

JUDGE OSTEEN: Okay. You got that, Ms. Powell? Thank you.

[668] MR. HAMILTON: Thank you.

BY MR. FARR:

Q So, Dr. Hofeller, I believe we just said this is Plaintiff's Exhibit 501, which is a chart about election results in the 12th Congressional District over the years, and I wanted to ask you, do you have any personal knowledge about whether the information that's in the column titled "Black Voting-age Population" is either single race black or any part black voting-age population?

A I haven't had an opportunity to check that, no.

Q Okay. And do you know whether or not the percentage listed in Plaintiff's Exhibit 501 for black voting-age population in 2010, is that for the 2000 Census or 2010 Census?

A Well, it would have to be for the 2000 Census because it's the same as the years previous.

Q Okay. So they didn't – as far as you can tell, they didn't put the black voting-age population for Congressional District 12 for 2010 – they didn't use the 2010 Census for that, based on your observations of this chart?

A I don't know whether they used the 2010 Census for all those numbers of 42.31 or they used the 2000 Census. So it was the 2010 census – the 2000 Census because there's no marking on the chart to indicate which census the data came from.

Q Okay. So you just don't know which census this is from from just looking at this chart?

[669] A That's true.

Q And the election results, again, we don't have the actual margins of victory on Plaintiff's Exhibit 501?

A That's true.

Q And there's nothing on this exhibit that shows how much money was spent by either candidate in these elections?

A No.

Q All right. So, Dr. Hofeller, in evaluating any efforts to redraw the 1st Congressional District in 2011, would it be pertinent or relevant to know the margins of victory of the incumbent candidate and compare that against the amount by which the district was underpopulated? Would that be a factor you would have taken into consideration?

A It could be, yes.

MR. FARR: Your Honor, may I approach?

JUDGE OSTEEN: You may.

BY MR. FARR:

Q Dr. Hofeller, I've handed you an exhibit we've marked Defendant's Exhibit 13. Have you seen this before?

A Yes.

Q Do you know what this is?

A This is a legislator's guide that was put out I believe by the General Assembly staff prior to the beginning of the actual line drawing process to review some of the information needed to begin the process.

[670] Q Okay.

A I think I remember hearing that it was, in some cases, an update of the previous document.

MR. HAMILTON: Objection, Your Honor, to this line of questioning. It's beyond the scope of cross-examination.

MR. FARR: It's not, Your Honor, because counsel has asked Dr. Hofeller whether there was any written instructions on redistricting criteria, and this, in fact, shows that there were.

MR. HAMILTON: That's apparently an effort to impeach his own witness. He testified, I think we went over this for maybe half an hour, that there were no written instructions with respect to the redistricting. I think I tested the Court's patience with that line of questions until we finally stopped. So I don't think it's appropriate for him to impeach his own witness. And, in any event, it's beyond the scope.

JUDGE OSTEEN: Give me just a second.

(Discussion between judges.)

JUDGE OSTEEN: Let's make it brief, Mr. Farr, but if this takes us down the road of a guide and instructions, then I'm going to reopen cross to examine – or I know there'll be a recross anyway, but I understand your point on what you're saying, and we'll allow – we'll grant you some latitude to address that.

MR. HAMILTON: Thank you, Your Honor.

[671] BY MR. FARR:

Q So, Dr. Hofeller, do you know what this exhibit is, Defendant's Exhibit 13?

A Yes.

Q And could you explain again what it is?

A Again, it was really a redistricting summary, much like the one that was issued in the previous redistricting, outlining the political and legal – mostly the legal requirements and the process itself and how it unfolds and information about how many districts are going to be drawn. It's a guide that was written by staff.

Q What's the publication date on this exhibit?

A March of 2011.

MR. FARR: Okay, Your Honor, I'll just let the exhibit speak for itself otherwise. So I'll move on to another exhibit.

JUDGE OSTEEN: Hold on just a second.

(Discussion between judges.)

JUDGE OSTEEN: Mr. Farr, at this point I understand your point, but he's identified it – in terms of speaking for itself, with respect to this particular witness, I'm not real clear on the relevance of it at this point.

MR. FARR: Well, could I ask him another question?
JUDGE OSTEEN: You sure can.

BY MR. FARR:

[672] Q All right. Dr. Hofeller, go back to Exhibit D13. Have you ever seen this exhibit before? It's the legislator's guide for redistricting?

A Oh, I'm sorry. We're back there. Yes.

Q And had you reviewed that exhibit during the time frame or close to the time frame on which it was published?

A Yes, I read it.

MR. FARR: That's all, Your Honor.

JUDGE OSTEEN: All right.

BY MR. FARR:

Q Now, I've just handed you Defendant's Exhibit D5.11. Do you recall during your testimony on cross-examination by plaintiffs' counsel – if you would look to your witness notebook that plaintiffs' counsel gave you, Dr. Hofeller. Do you see this notebook?

A I do.

Q Okay. Under Tab 18 –

A Yes, I have it.

Q Excuse me, it's Tab 67.

A Yes.

Q Plaintiffs' counsel cross-examined you on one of the statements that were issued by the redistricting chairs during the course of redistricting, is that right?

A Yes.

Q He didn't question you on some of the other statements [673] that were issued by the chairs, is that correct?

A Yes.

Q And can you look at Exhibit D5.11 and tell me whether or not – as far as you know, is that a complete set of all the statements made by the redistricting chairs during the redistricting process?

A I believe it is, yes.

Q All right. I want you to first look at the statement. It starts on the – it's the 9th page of Exhibit D5.11, and it's a statement issued by the chairs on June, 22, 2011. If you could find that, please.

A June 17?

Q 6/22/11 is the statement.

A The 9th page?

Q Yeah. The pages, unfortunately, are not numbered. So you just have got to take the 9th page. There should be a statement there that says June 22, 2011.

A Up at the top right-hand corner?

Q Yes.

A Yes. Which page?

Q I'm trying to find it.

A Okay.

Q I want you to read a statement. Okay. I found it. Turn to page 4 of that particular statement.

A Yes.

[674] Q Do you see the third paragraph on that page, starts with "while districts"?

A Yes.

Q Could you read that paragraph into the record, please.

A "While districts that adjoin minority-black districts may become more competitive for Republican candidates because of compliance with the VRA, such competitiveness results from compliance with the VRA. This in opposition of the prior legislative leadership intentionally cracking majority-black districts required by the VRA to ensure the reelection of white incumbents".

Q Okay. Thank you. Now, I want you to read one more statement from exhibit –

JUDGE GREGORY: Tell us, what does that rebut?

MR. FARR: Sir?

JUDGE GREGORY: What does that rebut?

MR. FARR: I'm sorry, Your Honor?

JUDGE GREGORY: What does that rebut?

MR. FARR: It's rebutting the fact that the leadership in the General Assembly never meant anything about the political impact of the plans. There was a long line of questions of Dr. Hofeller where they read one of the statements –

JUDGE GREGORY: Well, your witness said he didn't know anything about the intent on Guilford County in terms of [675] drawing it at a level that's higher than the existing number of blacks. So what are you rebutting from this?

MR. FARR: Your Honor, what I'm rebutting is that counsel was allowed to cross-examine this witness on one statement made by the legislative leaders. They didn't look at all five statements, and he did not point

to the statements made by the legislative leaders stating that politics played a role in the creation of these districts.

JUDGE GREGORY: It looks like you haven't laid a foundation of this one that he knows about statements made by other persons anyway, but it's getting late now. That's fine.

MR. FARR: Thank you, Your Honor.

BY MR. FARR:

Q Dr. Hofeller, I want you to turn to the last statement by the congressional leaders – or the legislative leaders. It's dated July 19, 2011.

A Yes, I have it.

Q All right. Could you turn to page 4 of that statement?

A Yes.

Q Okay. Could you – would you go down to the first sentence in the third line from the bottom and read the rest of that statement – rest of that paragraph into the record?

MR. HAMILTON: Objection, Your Honor, there's no foundation that this witness has ever read or seen this document before, and he's not the author since we know – or at [676] least it hasn't been established that he's the author. So we're just reading a document he doesn't have anything to do with into the record, and I don't think that's an appropriate use of this document.

JUDGE OSTEEN: Didn't you do the same thing with the other document, the public statement, the July public statement that we had the discussion about, didn't know if it was the first map and so on?

I mean, this is in the record, and we can read this. So let's just make it – during direct, there was comment on Rucho and Lewis public statements. Now we're getting – kind of going down the road a little bit. We're capable of sorting that out. Let's quickly wrap this up.

Where were you, Mr. Farr? I am going to overrule – well, hold on a second.

(Discussion between judges.)

JUDGE OSTEEN: I'll tell you what. If you'll just identify it again. We don't need it read again. Just identify what you wanted him to look at.

MR. FARR: Okay. Thank you, Your Honor.

JUDGE OSTEEN: It's D511. It's the 7/19/2011 public statement, page –

MR. FARR: It's pages 4 and 5. May I just read the sentence and ask him a question, Your Honor?

JUDGE OSTEEN: You may.

[677] BY MR. FARR:

Q The last sentence in this statement, Dr. Hofeller, says: "By continuing to maintain this district as a very strong Democratic district, we understand the districts adjoining the 12th District will be more competitive for Republican candidates."

Now, is that statement consistent with the instructions you received from the redistricting cochairs?

A Yes.

MR. FARR: No further questions, Your Honor.

JUDGE OSTEEN: Mr. Hamilton?

MR. HAMILTON: No recross, Your Honor.

JUDGE OSTEEN: All right. You may step down.

THE WITNESS: Thank you, Your Honor.

(At 2:28 p.m., witness excused.)

MR. FARR: Your Honor, could we just have two minutes to go to the back of the courtroom because we may have a proposal for shortening the rest of the proceeding? Can we just consult with our client for a second, and then we'll come back?

JUDGE OSTEEN: We're going to take a 5-minute recess.

(At 2:29 p.m., break taken.)

(At 2:36 p.m., break concluded.)

MR. FARR: Your Honor, given where we stand in today's proceedings, we were going to call Senator Rucho and [678] Representative Samuelson to give their version of the conversation with Representative Watt. They have already given that testimony in the *Dickson* case. So we're just going to submit their testimony in the *Dickson* on that issue and will not be calling them as a witness.

JUDGE OSTEEN: Any objection to our consideration of that testimony?

MR. HAMILTON: No objection, Your Honor.

MR. FARR: And –

JUDGE OSTEEN: Hold on just a second. All right. Yes, sir?

MR. FARR: Your Honor, we would like to submit an exhibit to the Court that relates to the email where we were having the attorney-client privilege issue discussion. It's the deposition transcript from the deposition where this exhibit came up. I would just like – we don't have to argue that at the moment.

JUDGE OSTEEN: Let me see where we are on the evidence. Will there be any additional evidence – or witnesses called by the defense?

MR. FARR: No, Your Honor. That's it.

JUDGE OSTEEN: Okay. So we're getting the straightening out exhibits. All right. So you've got the deposition testimony you want to submit in relation to the – where is that motion now?

[679] MR. HAMILTON: To be clear, I don't mean to interrupt, we have a very, very short rebuttal.

JUDGE OSTEEN: Right. I am going to get all the exhibits straightened out, and then we'll hear from your – if you have rebuttal evidence, we'll take it then.

MR. FARR: Your Honor, I have a copy of the plaintiff's exhibit attached to the transcript, Plaintiff's Exhibit 564. Is that right?

MR. HAMILTON: That was –

MR. FARR: The document we're contesting about attorney-client privilege.

MR. HAMILTON: That's right.

MR. FARR: So I've got their exhibit and the deposition transcript. We've marked the deposition transcript as Defendant's Exhibit 131, and I'd just like to hand that up to the Court.

JUDGE OSTEEN: Okay. That's with respect to Plaintiff's Exhibit 13, or is that the –

MR. HAMILTON: That's correct, Your Honor.

JUDGE OSTEEN: Okay.

MR. HAMILTON: Exhibit 564 is Plaintiff's Exhibit 13. MR. FARR: Oh, okay, I'm sorry. 564 is the *Dickson* deposition sticker. May I hand it up?

JUDGE OSTEEN: Yes. And you'd like us to consider that in relation to their efforts to admit that exhibit?

[680] MR. FARR: Yes, Your Honor.

JUDGE OSTEEN: Okay.

MR. HAMILTON: Now, Your Honor, Mr. Strach, when appropriate, would like to move all our exhibits into evidence at this point in time.

JUDGE OSTEEN: All right. Mr. Strach, I don't know how you intend to do this, but we'll do it in such a fashion as to communicate effectively to Ms. Powell.

MR. STRACH: I'm going to try, Your Honor. What I was going to do – I think that both parties agree with this, but at Docket Entry 95, a lot of materials from the *Dickson* case were filed with this Court and then additional materials were sent to the Court on a CD. And, Your Honor, we were going to move into admission into the trial record all the information that was filed. I'll give you the docket entry number.

JUDGE OSTEEN: All right.

MR. STRACH: It's Docket Entry 95, filed July 1, 2015. I'm going to call it plaintiffs' and defendant's joint notice of filing the state court record in *Dickson v. Rucho*. Your Honor, that contained the record on appeal in the North Carolina Supreme Court in the *Dickson* case. That case number in the North Carolina Supreme Court is No. 201PA12-2, and that filing included the record on appeal and what are called the Rule 9D exhibits and materials that were also filed with the [681] state supreme court.

JUDGE OSTEEN: All right. And in terms of plaintiffs, no objection to our accepting those?

MR. HAMILTON: No objection, Your Honor.

JUDGE OSTEEN: All right.

MR. STRACH: And, Your Honor, to the extent not covered by the above, we're going to move in – we're going to move to admit our specific exhibits that we've presented and prepared for use at trial. Defendants – we would move in Defendant's Exhibits 1 through 122. Your Honor, to our knowledge those – none of those are – well, some of them are objected to, but they were all disclosed, and we're going to ask to move in Defendant's Exhibit 1 through 122, including all the subparts and A versions of those exhibits.

Your Honor, if it's okay, I'll highlight some of the objections. There's a few –

JUDGE OSTEEN: All right. Let me – let me get the numbers. Are there any other numbered exhibits, or do 1 through 122 take care of everything?

MR. STRACH: No, 1 through 122 will take care of all the exhibits that were disclosed pretrial.

JUDGE OSTEEN: Okay.

MR. STRACH: Then we have Defendant's Exhibits 124 through 131 – I'm sorry, let me read these out. Defendant's Exhibit 124, which is a comparison chart of the 2011/2001 [682] enacted plans for the 1st District. Defendant 126, that's the historical congressional maps binder. D128, which is the Michigan Law Review article regarding compactness. D129, which is Appendix 1 to the Tom Hofeller resume. D130, which is the third affidavit of Tom Hofeller in the *Dickson v. Rucho* case. D131, which are depo excerpts from the Tom Hofeller deposition in *Dickson v Rucho*.

JUDGE OSTEEN: Then we have 500 – or you may be getting there. Those are Plaintiff's Exhibits 500 and 501.

MR. STRACH: And then finally, Your Honor, I would just note the plaintiffs yesterday moved in four of our exhibits that, just for the record, I'll state what those were. Those were Defendant's 5.11, Defendant's Exhibit 30, Defendant's Exhibit 19, and Defendant's Exhibit 118.

JUDGE OSTEEN: Okay. All right. So 1 through 122. I don't recall there being any objection to the 124, -6, -8, -9, -30, and -31. Am I right about that?

MR. HAMILTON: There is a pending objection to Exhibit 121.

JUDGE OSTEEN: Right, but that's in that second – the second group, 124 –

MR. STRACH: No, Your Honor, that's in the first group. 121?

JUDGE OSTEEN: He said 121, but right now, I'm just talking about that second batch of numbers: 124, -6, -8, 129, [683] -30, and -31. I think I remember those exhibits. I don't think there's any objection to those.

MR. HAMILTON: If the Court would give me just a moment to –

JUDGE OSTEEN: I'm going backwards on you. Sorry about that.

MR. HAMILTON: That's all right. It's not a problem. So we have no objection to Exhibit 124.

JUDGE OSTEEN: Okay.

MR. HAMILTON: I think that's right. We do object to Exhibit 124, I'm sorry. Your Honor, this is the one where we have no objection to the top box –

JUDGE OSTEEN: Okay. So there is –

MR. HAMILTON: – but we do have a continuing objection to the bottom two boxes, the bottom two-

thirds of that document, which was not produced before. So that's Exhibit 124. 126, the map binder, we have no objection to. I love reading the Michigan Law Review, so we have no objection to Exhibit 128.

JUDGE OSTEEN: Tip of the hat to Judge Gregory?

MR. HAMILTON: 129 is the appendix of the Hofeller CV. So that's fine. No objection there. No objection to either 130 or 131.

JUDGE OSTEEN: Okay. So that leaves us with 124, which we're going to take a little closer look at. So that [684] leaves us 1 through 122.

MR. HAMILTON: And the only objection there, Your Honor, is Exhibit 121.

JUDGE OSTEEN: And what was 121?

MR. HAMILTON: It was an analysis by Dr. Barry Burden, I believe, and it was a document – our primary objection aside from hearsay is that it's irrelevant. It was a document prepared long after these maps were drawn, and it has no relevance to the issue –

JUDGE OSTEEN: Is that the one you withdrew your objection on and then it turned out it had been prepared two weeks ago, or something like that?

MR. HAMILTON: No.

JUDGE OSTEEN: Okay. All right. Let's just for purposes – then I'll admit Documents 1 through 120, Document 122, Documents 126, 128, 129, 130, and 131, all defendant exhibits. I'll note the objection right now to 124. We'll take that one under advisement. And with respect to Exhibit 121, again, we will take that under advisement. I'll simply note for the record that Defendant's Exhibits 11, 30, 19, and 118 are admitted in both cases.

MR. STRACH: All right. Then I have just one other thing, Your Honor. We would like to go ahead and formally move admission of our deposition counter-designations, just to be on the safe side. Those were filed at Docket Entry 117 on [685] September 28, 2015.

JUDGE OSTEEN: Let me see. Have you all looked at them? Are there any objections to the counter-designations?

MR. HAMILTON: No, Your Honor. I think we can jointly move the admission of the designations plus the counter-designations.

JUDGE OSTEEN: All right. And that's Document 117 is where those were found?

MR. STRACH: Ours are Docket 117. I'm not sure where the plaintiffs are.

MR. HAMILTON: I'm afraid, as I stand here, I can't recite the docket numbers.

JUDGE OSTEEN: Well, we will – to the extent the plaintiffs' pretrial disclosures include – included deposition counter-designations, we'll allow those as part of the record.

MR. HAMILTON: Thank you, Your Honor.

MR. STRACH: Thank you, Your Honor. That's all we have.

JUDGE OSTEEN: All right. We still have obviously, just to be clear, issues remaining with respect to plaintiff – in addition to what I just described, issues remaining with respect to Plaintiff's Exhibit 13, which we will resolve later. We have the Hofeller testimony, including Defendant's

Exhibit 124, which was objected to on the basis of not disclosed – properly disclosed as part of the expert [686] testimony. And then we have objections outlined

in both of the motions in limine, which I think are still under advisement at this point.

All right. So that – does that take – anything I need to be aware of?

JUDGE COGBURN: Do we have the charts in? That's 500 and 501.

MR. HAMILTON: Those have not been admitted yet, Your Honor. As soon as we have an opportunity to present our rebuttal case, I was going to offer those.

JUDGE OSTEEN: Defendant's Exhibit 121, there is an objection. Refresh my – maybe we can get this resolved. For what – I can't remember where 121 came up. Do you remember where that one was presented?

MR. HAMILTON: It didn't, Your Honor. There was no witness that discussed it. It was simply part of the mass of documents that's to the right of the Court.

JUDGE OSTEEN: It's listed as an expert report by Barry Burden, Ph.D, that was submitted with NAACP versus McCrory, et al.

MR. FARR: Yes, Your Honor, that was a public document. There's a docket entry number for it in the United States versus North Carolina lawsuit that was tried in front of Judge Schroeder. We can provide that docket entry, and that was – we offered that because Dr. Burden gave testimony in [687] that case and a report that racially polarized voting is still very strong and prevalent in the state of North Carolina.

MR. HAMILTON: And, Your Honor, Dr. Burden testified in a different case, not the state case, a whole different – and he was never disclosed as an expert in this case, never deposed. It's simply not a relevant exhibit in this case for that proposition. So, your Honor, we would object to its admission.

JUDGE OSTEEN: All right. I am going to – I'll simply leave – take it – it is an expert report. If it wasn't disclosed – I understand it's part of the public record in another case. That doesn't immediately make it relevant or admissible in this case. I will leave you with this,

Mr. Farr – well, let me see.

(Discussion between judges.)

JUDGE OSTEEN: Mr. Farr, at this point, it's an expert report; and if it wasn't part of the disclosures, I don't find it's admissible. But if you're taking aback – if that comes as something of a surprise – well, let me back up. It's not admissible because, as an expert report, it wasn't part of the disclosures in this case, but I'll give you a couple of days – or not I – the Court will give you a couple of days if you want to submit something before we get started that you think should convince us otherwise.

MR. FARR: That will be fine, Your Honor. Thank you [688] very much.

JUDGE OSTEEN: All right. All right then. The plaintiffs have rebuttal evidence?

MR. HAMILTON: We do, Your Honor. At this point – maybe we'll do this in reverse order and offer Exhibits 500 and 501. Those are the two big election tables that we had.

JUDGE OSTEEN: All right. Are they plaintiff's exhibits?

MR. HAMILTON: I think they're Plaintiff's Exhibit 500 and 501.

JUDGE OSTEEN: Plaintiff's Exhibits 500 and 501, which is enlargements of exhibits appearing in the Hofeller notebook at Tabs 1 and 12, are admitted.

MR. HAMILTON: Thank you. Then we would also offer Exhibit 700, which is the excerpt from the Federal Register. It's the very last tab in the page, and, of course –

JUDGE OSTEEN: Any objection to that?

MR. HAMILTON: – the Court can find it in the Federal Register, but this, I thought, would be convenient.

JUDGE OSTEEN: I would prefer not to have go looking. Thank you.

MR. FARR: No objection, Your Honor.

JUDGE OSTEEN: All right. Then the exhibit labeled in the Hofeller notebook as Tab 700, the Federal Register excerpt, is admitted.

* * *

[691] why – I believe Dr. Hofeller testified that it introduces bias into the analysis if you include both the counties that were touched by the benchmark plan and by the enacted plan. Is Dr. Hofeller correct on that?

A No.

Q And can you explain why?

A The concept here is like the analysis with Voting Tabulation Districts. The analysis of the counties is – they're a definition of where the district is located, where the state legislature chose to locate the district; in which counties, that's a broad definition of the area; or in which VTDs, under the old map or the new map, and that's explained in the report.

So the concept for the county envelope is all the counties in which it was placed under the old map or the new map and where the boundaries happen to go

within that envelope. Same with Voting Tabulation Districts. So all the Voting Tabulation Districts in which – or for which the legislature under one map or the other had the boundary of the district.

Q And Dr. Hofeller suggested that the appropriate way to look at this is only benchmark alone or for enacted plan alone. Do you agree with that?

A No, I disagree.

Q Okay. And what would be wrong with doing it that way, or would it?

[692] A The problem is you'd be kind of comparing apples and oranges if you followed the approach that he had suggested on the stand because you would be actually shifting the baseline of what the area of comparison is. You'd be saying, well, it was in this region in that time and in this region in that time. If they were in different regions, that would be fine, but that would be more like a renumbering of the districts. But this district is roughly located in this region. The broad stroke definition is all the counties in which it appeared in either version of the map, and the narrowly defined definition is all the VTDs in which it was defined in one version of the map.

MR. HAMILTON: Thank you. No further questions, Your Honor.

JUDGE OSTEEN: Cross-examination?

CROSS-EXAMINATION

BY MR. FARR:

Q Doctor, in your report, did you disclose that you had used all the counties in both the 2001 and the 2011 1st District as your envelope?

A My writing of it was that – my understanding, the way I read the words as I wrote them. If it wasn't clear, nobody asked me a question to clarify that.

Q Okay. Did you take a look at how the envelope would look for CD 1 if you only looked at the counties that were CD 1 in [693] 2001?

A No, because that would – I'm looking at the region where the district is located under either map, and that would be kind of part of the definition of the region, not my entire definition of the region.

Q But if you had been wanting to see – you used the term "racial sorting" several times. If you wanted to see the racial sorting, as you described it, that was done by the individuals who supported and voted for the 2001 1st Congressional District, wouldn't it have been appropriate to look at the county in which that district was located?

A If I was just looking at one district in one cycle without comparison with other districts, the only information I'd have to define the region would be just that set of counties. I think that's what the question is asking, is that right?

Q You're saying that if you had done this in 2001, you would have looked at the – as the envelope for the 2001 Congressional District 1, you would have looked at the counties in which it was actually located?

A In '97 and in 2001.

Q Right. You wouldn't have included Durham County in that?

A If I was – in that context, that was how I would define it, but the legis – definition of which county is which counties the legislature chose to locate the map under both versions of the plan.

[694] Q Okay. Now, you have another chart in one of your reports where you talk about the population in Durham County, the total population and the African-American population?

A Correct.

Q Is it fair to say that in all the counties that were either in the first – the 2011 1st District or the 2011 1st District, that Durham is the most populous county?

A I don't have the population statistics in front of me, but it might be.

Q You wouldn't –

A I don't recall.

Q You don't recall that. Okay. Was Durham County – do you know enough to know whether or not the total population and the black population in Durham County is one of the higher population totals amongst all the counties that would be in either the 2001 or the 2011 1st District?

A I would have to look at the data to make that analysis.

Q So you have no idea?

A I know in the report I report, you know, what the total populations are and what percentage is Durham County. This is in Exhibit 18, my response report. So what percentage of the population from Durham County is put in CD 1 and what the black percentage of that – of the county is that was put in CD 1 versus the white percentage of the population that was not or was.

[695] Q But you couldn't say whether or not Durham County was one of the more – had one of the larger populations of the counties in the 1st District –

A I did not do a comparison county by county of the populations.

MR. FARR: That's all, Your Honor. Thank you.

JUDGE OSTEEN: Anything in response to that?

MR. HAMILTON: No redirect, Your Honor.

JUDGE OSTEEN: All right. Dr. Ansolabehere, you may step down. Thank you.

(At 3:02 p.m., witness excused.)

JUDGE OSTEEN: Further evidence, Mr. Hamilton?

MR. HAMILTON: No further evidence, Your Honor. Plaintiffs rest.

(Discussion between judges.)

JUDGE OSTEEN: Mr. Farr, let me ask you one question with respect to Plaintiff's Exhibit 13, which is the email and attorney-client privilege that's been asserted. There was an assertion made, and we're not – or at least I'm not clear on the response that this document was later filed by the defendants as part of the record in the Supreme Court. Is that correct or incorrect, or we're not sure about that at this point?

MR. FARR: Your Honor, I don't know. It's possible that that happened as part of a joint filing. I'm sure that we [696] did not file it on our own; and, honestly, I had forgotten that the exhibit existed until I saw it today.

There was a massive filing in the *Dickson* case, as there was in this case, but, basically, we agreed to throw the whole kitchen sink into the record before the North Carolina Supreme Court; and our argument would be that under Rule 26, either if you look at the state rule or the federal rule, once we objected to that document and claimed that it was privileged, it should

have been returned to us, destroyed, sequestered. Those are the rule – the terms that are used in Rule 26, and that was the obligation of the plaintiffs to do that.

And I plead guilty, Your Honor, if it was jointly filed with, you know, 500,000 other pages of paper, then I didn't catch that. If that constitutes a waiver, then we waive it. But I really do believe, Your Honor, the thing shouldn't even have been in the record because the plaintiffs owed us an obligation under Rule 26 to hand the thing back to us or destroy it or retrieve it or seek a ruling from the Court on whether it was privileged.

JUDGE OSTEEN: Well, what I'm inclined to do is just keep it under advisement; but if there's nothing filed to suggest contrary to what's been asserted, that it was filed by the defendants in the Supreme Court or as part of a record, then we'll proceed ahead on that finding. Yes, sir, Mr. Speas?

[697] MR. SPEAS: Your Honor, if I could just clarify. The documents were filed in the trial court by the defendants. The documents, as filed in the trial court by the defendants, included Exhibit 13. When the appeal was filed, the parties jointly filed the record on appeal.

JUDGE OSTEEN: Okay. So it was the first filing that you contend in the trial court?

MR. SPEAS: Yes.

JUDGE OSTEEN: Take a look at that and check it out pretty quickly.

MR. FARR: Your Honor, can we have overnight to look at that and respond?

JUDGE OSTEEN: Yeah, I mean, I didn't expect it today, but we gave you until I think maybe Monday to

respond to the other thing, whatever it was, and so same time frame for this in terms of verifying the facts.

MR. FARR: All right. We'll find out for sure, Your Honor; and as I said, if we filed it, which I have no idea whether we did or we didn't with lots of other things, then I guess we waived it.

JUDGE OSTEEN: Judge Gregory has got a question. JUDGE GREGORY: I have one question, counsel. Assume just for the sake of argument you get past waiver.

MR. FARR: I'm sorry, Your Honor?

JUDGE GREGORY: Assume for the sake of argument right [698] now that you get beyond the question of waiver. You propose that this is attorney-client privilege?

MR. FARR: Yes, sir, I sure do.

JUDGE GREGORY: And you hired the expert in this case?

MR. FARR: Yes.

JUDGE GREGORY: And there's an old term, I guess I'm sort of a dinosaur, but we call it a res gestae. You're part of the res gestae of this case, the most important part, right? Weren't you engaged before any drawings were done?

MR. FARR: Yes, Your Honor.

JUDGE GREGORY: And you actually hired the expert before the drawings were done?

MR. FARR: I did.

JUDGE GREGORY: So if the question comes up as to whether instructions were given, are you claiming that you can raise the attorney-client privilege if we

ask whether instructions were given through you for the drawing of these plans?

MR. FARR: I don't think there's anything in that email about instructions, Your Honor, and I do think there is an argument that discussions between counsel and expert witnesses under the new Rule 26 are protected from discovery.

JUDGE GREGORY: Yeah, they're normally in a different context than this, though. But, anyway, I just put that on [699] notice on that question to you.

MR. FARR: All right. Thank you very much.

JUDGE OSTEEN: All right. So here is what we're going to do. We're going to – I need about 15 minutes to kin of get things in place for arguments.

Arguments, roughly speaking, if you don't get any questions, then you ought to target – we'll say 20 minutes, but if – I would say it's reasonably likely both sides may receive some questions. We don't have a red, green, or yellow light here, so we won't cut anybody off right at 20 or 25 minutes; but I can assure you that at about 30 minutes, we won't be listening to you much anymore. I mean that with all due respect to both sides. You've still got findings of fact and conclusions of law that are going to be presented. So there will be plenty of opportunity to close out this case.

So, roughly speaking, target 20 to 30 minutes for your arguments. We will, I think, try to stop promptly at the 30-minute mark, which I think is plenty of time, given the briefing that has transpired and will transpire in relation to the findings of fact.

Any questions about that? Mr. Hamilton?

MR. HAMILTON: No, Your Honor, no questions.

JUDGE OSTEEN: Mr. Farr?

MR. FARR: No, Your Honor.

JUDGE OSTEEN: Do you all anticipate dividing your [700] argument at all, or will one lawyer for both sides handle it?

MR. HAMILTON: From the plaintiffs, I'll be presenting the closing argument.

MR. FARR: I'll be doing it for the defendants, Your Honor. I hope to not be up here for 20 minutes. I think we filed a brief, and you're getting findings of facts from us, and I also think the arguments are pretty plain from the way the evidence came out.

JUDGE OSTEEN: That sounds good. We'll be in recess for 15 minutes.

(At 3:10 p.m., break taken.)

(At 3:32 p.m., break concluded.)

JUDGE OSTEEN: All right. Closing arguments?

Mr. Hamilton, are the plaintiffs ready to proceed?

MR. HAMILTON: We are, Your Honor.

JUDGE OSTEEN: All right. You may do so.

MR. HAMILTON: Good afternoon, Your Honors. Let me start by thanking the Court on behalf of all the lawyers appearing before you today on behalf of the plaintiffs for your courtesy and patience over the course of the last week. It has been an honor and pleasure to appear before you, and I thank you for that.

There's been a lot of evidence presented over the last few days, but the case before you boils down to a very simple proposition. May North Carolina's General Assembly [701] purposely transform North Carolina's 1st and 12th Congressional District into 50 percent black voting-age population districts when African-

American voters in both of these districts had already been electing their candidates of choice without fail for 20 years? The answer to this question has been addressed and definitively settled by the United States Supreme Court in its recent *Alabama* decision, which unambiguously condemned the kind of misguided interpretation of the Voting Rights Act we've seen here.

What the State did was turn the Voting Rights Act on its very head. The record showed that over the last 20 years voters were joining together and voting across racial lines in these two districts, and the result was that African-American candidates of choice were winning elections, not just some of the time, but all of the time.

The Voting Rights Act was designed to break down barriers to equal participation in the political process. It was designed to encourage just this kind of – just this kind of state of affairs where voters vote for candidates based on the content of their policies and not the color of their skin.

The Voting Rights Act most certainly was not designed to require a State to segregate African-Americans into majority and minority districts whenever possible. The very idea is repugnant to everything the Civil Rights Movement fought for and everything the statute stands for.

[702] So the first question before the Court is whether race predominated in the drawing of these two districts. That's the key inquiry of predominance, and, here, that's really easy because they told us. This is a direct evidence case. It's not a circum-stantial evidence case. It's not the kind of case you need to look at district shapes or really weigh compactness and try to decipher what they're up to because they told us.

They told us what they were doing and why when they drew these two congressional districts, just like Alabama did in the *Alabama* case.

Now, there's plenty of circumstantial evidence as well, all of which just confirms what the legislature was up to and told us outright. So let's perhaps start with the direct evidence.

It's clear and undisputed that Senator Rucho and Representative Lewis, the map drawers, or those controlling the map drawers, believed that compliance with the Voting Rights Act required them to consider race when drawing CD 1 and CD 12. That means that the General Assembly used – the means that they used to that end was a 50 percent black voting-age population.

JUDGE OSTEEN: Walk me through what you contend is the direct evidence with respect to CD 12.

MR. HAMILTON: CD 12 – and we've put it up here on the board. The evidence is – well, first of all, we can look [703] at the black voting-age population. It changed more dramatically than CD 1. It went 43.8 percent all the way up to 50.7 percent. At the time, in the public statement Senator Rucho and Representative Lewis stated that, quote, because of the presence of Guilford County in the 12th District, we've drawn our proposed 12th District at a black voting-age level that's above the percentage of the black voting-age population found in the current 12th District. That's Plaintiff's Exhibit 67.

Now, it's instructive to compare that statement with the facts in the *Alabama* case. In *Alabama*, the problem was that the General Assembly there, the legislature in *Alabama*, said their view of retrogression is you've got to keep the black voting-age population where it is or higher, but it can't ever drop

below, and the Supreme Court emphatically rejected that and said that mechanical, numerical view is inconsistent.

And part of the reason we've put the Department of Justice regulations into evidence, it's a little odd, but it's important. This is a functional analysis. As the Supreme Court said in *Alabama*, they asked the wrong question.

JUDGE OSTEEN: Well, how do you equate what Rucho and Lewis said about the map in their public statement and what the map drawer said in terms of "I was instructed to make the neighboring districts heavily or more strongly Republican but race was not a factor"?

[704] MR. HAMILTON: There are two responses to that, Your Honor. First, we have Dr. Ansolabehere's testimony and analysis of both the VTDs and then the larger county areas where it clearly shows clear evidence –

JUDGE OSTEEN: That's the opinion circumstantial evidence. We're on direct.

MR. HAMILTON: That's right. And then, in addition, there was use of the Obama 2008 Presidential Election, which correlates very closely with registered black voters, and, in fact, again, we put that evidence up on the board here.

The correlation – the idea that you're going to take a singular unique event in American history, the first African-American candidate nominated for president from either major party, and suggest that that's not related to race, that doesn't pass the straight-face test, with all due respect. It is – of course, that had an influence on the way voters voted, and it had a very close correlation between the location

of registered voters, African-American registered voters, and the Obama vote. And, of course, it's not hard to see. That's common sense.

Of course, there's going to be some number of Republican African-American voters who are going to say this is my first opportunity to vote, and there's going to be some population of them that is going to cross over to vote. That makes sense.

[705] JUDGE OSTEEN: That's true with white and black Democratic voters.

MR. HAMILTON: Absolutely true, which is another way of saying that race matters in an election. I don't think that was disputed. I don't think Dr. Hofeller disputes that. Frankly, I don't think defendants dispute that, and the evidence that they put in this morning was that there's still racially polarized voting in the state of North Carolina, and I don't disagree that there is in places but not in sufficient numbers in this – in these two districts to defeat the African-American community's ability to elect the candidate of choice.

So the question is, in drawing these districts, did the legislature ask the right question under the *Alabama* analysis? And I would submit that they did not in either of these two districts. CD 1 is just easy. It's a flat numerical target. There was no narrow tailoring. There was no effort at narrow tailoring. Now, I'm not casting aspersions on what the General Assembly did. They were advised by their lawyers that, in their reading of *Strickland*, it required the creation of a 50-percent-plus-one district. I think that is a patently improper and erroneous construction of what the three judges who signed the majority –

JUDGE OSTEEN: *Strickland* doesn't allow a Court – you may disagree with this – doesn't allow a

Court to fashion [706] a remedy. *Gingles*, whatever the pronunciation is, if that issue exists, then *Strickland* does stand for the proposition that we, the Supreme Court, are going to require a majority minority district, and we're not going to allow you – or we're not going to permit a crossover district to be substituted for that. It's too hard to analyze.

MR. HAMILTON: Sure, but remember, in *Strickland*, the plurality opinion went out of its way to say, you know, in a district where there's majority – where there's white voters crossing over and voting with black voters, we can't imagine how you could establish the *Gingles* factors. It just doesn't make any sense, and then they express – they kind of scratch their head and say – of course, in this case, for some reason, it's undisclosed in the record. The parties stipulated to that. So it's a very odd factual record before the Court.

JUDGE OSTEEN: Would you agree that under the language of *Strickland*, for *Strickland* to apply, there first has to be a wrong as established by the *Gingles* factors?

MR. HAMILTON: Absolutely, absolutely. And an important – the factor that I'm afraid has not been really brought out well in the briefing, the remedy has to match the violation for Section 2. So you can't say there's racially polarized voting in this part of the district, so we're going to create an African-American district in that part, and this case is an excellent example of that.

[707] Durham County – I asked the questions today. The point of asking those questions is Durham County – and *Gingles* itself said there's no evidence of racially polarized voting in *Gingles* [sic] County, and on the guise of creating a Section 2 district in CD 1, they

carved up Durham County and took out the African-American piece. Why? I mean, on what theory could that possibly be something commanded by the Voting Rights Act when there's no racially polarized voting? How do we know that? Because of *Gingles*.

JUDGE OSTEEN: How do you – in contending there's no racially polarized voting, and I understand you didn't have – nobody had the study done, but G.K. Butterfield testified about the "east of 95" effect, and, frankly – I'm not saying ultimately what I would find, but let's assume for a second that his testimony was such as to assign great weight to it. If you move CD 1 around to the east, as was done, how does – how do those pieces – I guess the ultimate question is how do we weigh or how should I weigh Butterfield's testimony with respect to the polarized voting that still exists east of 95?

MR. HAMILTON: Well, I don't think there's any dispute about that, about the fact that in some areas there's polarized voting, but you can see – I don't have the tables up here, but the election tables, I think, are really – and part of the reason we blew them up like this is I think they're really telling. You have minority-minority districts. So that [708] is black voting-age population of less than 50 percent and a consistent string, not just some of the time, all of the time where, you know, right down the line, every single time, they're voting. I mean, that's happening – it's not to say that there's no polarized voting. There certainly might be in pockets, and there probably is in almost every state in this union, but the question – that's not the question.

The question is as – again, I'm sorry to keep referring to the *Alabama* case, but the right question is what – at what level do we need to have black voting-age population in order to ensure that the

minority community has the ability to elect? The DOJ guidelines on retrogression speak exactly to that same question.

So, yes, there may be some polarized voting, but unless it's sufficient to defeat the minority communities' ability to elect the candidate of their choice, it's background noise. It affects certainly where you have to draw the line to prevent retrogression, but it doesn't – it doesn't mean that you don't have a Section 2 issue.

And so, you know, here, the districts that were created that were in the 46, 47 percent black voting-age population were terrific examples of an application of the Voting Rights Act that worked. They were – they were examples that we should all be applauding at the behavior of the voters in those districts, and that's the problem here is that the [709] legislature took those and dismantled them on a theory and, I would submit, a misreading of the decision in *Bartlett v. Strickland*, that on their theory would require raising – significantly raising the black voting-age population. That's not what the Voting Rights Act – that's not what the Voting Rights Act requires at all.

Now, I'd like to talk just a couple minutes on narrow tailoring. Obviously, because the defendants have not even tried to defend CD 12 as a Voting Rights Act district, as they call it, they haven't even attempted to show any kind of narrow tailoring. So that – we just put that aside at the outset. They waived whatever defense they might have had, and there's no argument there.

As to CD 1, there was no effort at narrow tailoring. Their argument is almost even weaker in CD 1 because of the use of a flat numerical threshold. Narrow tailoring would be, well, we're going to do a

racially polarized voting analysis and determine, gee, you only need to have a 46 percent black voting-age – maybe it's a 40 percent. Maybe it's a 47 percent, whatever it is. You know, if the legislature had done that and used that as the basis for drawing these districts, absolutely fine. That's what's called a strong basis in evidence for drawing these districts, but they didn't. Instead, they used this misinterpretation of *Strickland* and applied a 50 percent BVAP rule. That's been condemned by [710] *Alabama*. That was the problem in the *Page* –

JUDGE OSTEEN: Isn't the 50 percent plus one just a majority minority number as established by the cases?

MR. HAMILTON: It is. Well, it is a majority minority number, absolutely, but it is not, in fact, what was required.

Your Honor, I have about five minutes left. I would like to save it for rebuttal, if I might?

JUDGE OSTEEN: Actually, that will give you about six minutes in rebuttal, by my count.

MR. HAMILTON: Thank you.

JUDGE OSTEEN: All right. Mr. Farr? Hold on just a second. Mr. Farr?

MR. FARR: Your Honor, we filed our brief. You've heard the evidence. I think the Court knows most of what our arguments are in this case. I think you understand that we contend that the 12th Congressional District was a political draw. It was based upon the Obama/McCain election and was also based upon how that district affected the surrounding districts.

I want to focus on the 1st District because I really need to clear up a few things that don't seem to be clear.

JUDGE GREGORY: I wanted to ask you about the 12th District if you are moving to the 1st.

MR. FARR: Okay, sir.

* * *

[717] JUDGE GREGORY: I'm good.

MR. FARR: All right. Thank you, Your Honor.

I just wanted to say a couple things about Congressional District 1. Of course, we do not think that race was the predominant motive for Congressional District 1. There were lots of other factors that went into it. But I do want to talk about the evidence as it relates to Congressional District 1 if the Court found that race was the predominant motive.

JUDGE OSTEEN: There's really no dispute in terms of the instructions to Dr. Hofeller that CD 1 was to be drawn at 50 percent plus one.

MR. FARR: That's right, Your Honor, but we think if you read the *Cromartie* case, the pretty predominant motive, particularly when there's a high correlation between black voters and voting for Democrats, it's a very demanding burden, and you have to show that the race – that the district is unexplainable but for race; and we've explained other criteria that were considered in drawing that district, including the severe underpopulation issue, which was the reason why it was drawn into Durham.

Also, drawing the district into Durham allowed the General Assembly to create Congressional District 4 as a very strong Democratic district, and the first

Congressional District was also based largely on the prior 1st Congressional [718] District. So there were other traditional criteria that went into the consideration of the 1st Congressional District.

In *Vera v. Bush*, the Supreme Court said that you don't prove racial predominance just because race was a factor in drawing a district. We don't dispute that it was a factor in drawing the 1st Congressional District, but we don't think it was the predominant factor.

JUDGE OSTEEN: All right.

MR. FARR: Now, if the Court finds that it was the predominant factor, I want to talk about the *Alabama* case.

The *Alabama* case was a Section 5 case. It wasn't a Section 2 case. The mechanical formula that the State adopted was a rule that they came up with, no precedent from the Supreme Court, that they were going to keep all their districts at their prior percentages of black population, including districts that were drawn at 70 percent, 65 percent, very, very high percentages of black population that we don't have here. That was the mechanical rule that the Supreme Court disagreed with in the *Alabama* case in the context of Section 5.

North Carolina followed a rule that was established by the US Supreme Court in *Strickland*. North Carolina did not come up with the 50-percent-plus-one rule. The US Supreme Court did.

And turning back to *Alabama*, Your Honor, what the *Alabama* Court said, which we think helps us, is that it's not [719] the State's obligation to prove a Section 2 violation. They have to show there was good reason to think that there might be a Section 2 violation, even if

a Court might subsequently find that there wasn't sufficient evidence to find a Section 2 violation.

JUDGE OSTEEN: Okay. And I – do you agree with what I asked earlier in terms of *Strickland* discussing the remedy, but also saying you only get to this remedy when there is a violation, and the factors to establish a violation are those set forth in *Gingles*?

MR. FARR: Exactly right, Your Honor, and our position is if those factors aren't present, then there shouldn't be a 47 percent district drawn in Northeastern North Carolina.

JUDGE OSTEEN: All right. So then the other –

MR. FARR: It should go away.

JUDGE OSTEEN: In terms of intent and direct evidence, there's a lot of discussion – or there is some evidence, shall we say, that this map was drawn to comply with *Strickland* which suggests that it was drawn to create a majority minority district.

I don't know that I've seen anything to suggest that the legislature first analyzed the *Gingles* factors to ensure that there was a problem that needed to be remedied under *Gingles*.

[720] MR. FARR: Well, thanks for asking that question, Your Honor, because that's a good thing to clear up right now. In fact, the legislature did that.

First of all, you had the historical precedent of the district being drawn as a voting rights district, and there's two types of districts that are pertinent here. One is a majority-black district and the other would be a majority minority coalition district, where the non-Hispanic whites are in the minority in the district. The 1st District has always been drawn as a majority non-

Hispanic white district. Whites have never been in the majority in the 1st District.

There's also something called a "crossover district." That's where whites are in the majority, and they cross over to support the black candidate of choice. It's never been a crossover district. So this district has been, in voting rights terms, a majority-black district beginning. It was a majority black district in total population in – maybe even in '97, and in voting-age population it's always been a majority minority coalition district. It's never been a majority-white district.

JUDGE OSTEEN: The third factor in *Gingles*, though, is the minority must be able to demonstrate that the white majority vote sufficiently as a bloc to enable it in the absence of special circumstances, usually to defeat the minority's preferred candidate.

[721] MR. FARR: Thank you for that question, Your Honor. In fact, the General Assembly had two studies performed and two different experts, one submitted by the NAACP named Dr. Ray Block, I think his name was, and then the legislature hired someone named Tom Brunell. Both of them did polarization studies for all of the counties, including in the 1st Congressional District.

Mr. Block only looked at black/white races that had taken place from 2006 through 2010; and in doing that, he missed a couple of counties where there had not been a black/white race. So Dr. Brunell looked at racial polarization in all the counties in the northeast; and between Dr. Brunell and Dr. Block, both of those experts gave testimony that there was statistically significant racially polarized voting in all those counties in which the 1st District was finally enacted.

And the other evidence, Your Honor, that supports that is that counsel for the NAACP made a statement that there was very strong racially polarized voting in North Carolina. The NAACP, through the Southern Coalition for Social Justice, proposed a majority minority coalition district in the north-astern part of North Carolina as the 1st Congressional District. The Democratic leadership proposed a majority minority coalition district in that part of the state. Those two groups, plus the legislative Black Caucus, proposed legislative plans; and in all three of those legislative plans, [722] all three of those groups proposed majority-black or majority minority coalition districts in every county that's in the 1st Congressional District, including Durham.

Now, I do want to say something about Durham, Your Honor.

JUDGE OSTEEN: I want to talk about G.K. Butterfield for a minute.

MR. FARR: Okay.

JUDGE OSTEEN: There may be – let's assume there is expert testimony out there. G.K. Butterfield – Congressman Butterfield came into this Court and said with respect to CD 1, as it was presently constituted, he felt like, generally speaking – I think it was a 70 – maybe a 70, 75 percent of the white bloc would not cross over and vote for a black candidate, but he thought that with – there was 20, 25, or 30 percent who would, better than it had been in years past. So if I weigh Congressman Butterfield's testimony significantly, is that at odds with whatever the experts have said?

MR. FARR: Well, I think that was important testimony, Your Honor, and I think it's also important to note that, again, the district was underpopulated by

over 97,000 people. So Congressman Butterfield seems to think and testified that he thought there was still racially polarized voting in that part of the state that required an elevated percentage of black population for black voters to have an [723] equal opportunity to elect their candidate of choice. He didn't come in and say that we could use a 20 percent district, which is the black population in the state. It's about 22 percent. He didn't advocate for that. He didn't advocate for a 35 percent district. He testified that – I believe he said it needed to be at 47 percent in his opinion.

Well, here is what the *Strickland* –

JUDGE OSTEEN: Didn't he say they could go maybe as low as 35 to 37 percent, but he would prefer to be in the mid 40s?

MR. FARR: I thought he said 45 to 47, Your Honor. I thought he said 45 would be a difficult race, and 47 would be the preferred number is what he talked about.

So the question is what 97,000 voters do you put into the district to make sure that African-Americans have an equal opportunity to elect candidate of choice at 47 percent? How do you factor in the fact that Congressman Butterfield is an incumbent? He's very popular with all constituents.

One thing that has not come before the Court, the plaintiffs want to look at the voting percentages. We have evidence and the trial court in the *Dickson* case looked at evidence about what the actual vote differences were in these elections.

So, for example, I know in 2010, and I'm pretty sure there's another election for Congressman Butterfield where his [724] margin of victory was less than – I mean, substantially less than 97,000 people, which is

the amount of people that would have to be added to that district to bring it up to one person, one vote. And this goes directly to what Justice Kennedy wrote about in the *Strickland* case, and he said that if there's racially polarized voting, and if the *Gingles* factors are present – and there's a question, Your Honor, really whether the *Gingles* factors are things like disparities in education and income and whatever. There is testimony in the record – ample testimony in the record that that still exists in the area of the 1st Congressional District, but there's a question about whether a legislature has to actually have that type of information. It's arguable that the legislature just needs to have the three *Gingles* preconditions, and – which is blacks can be a majority in a single-member district or the black population is geographically compact, they're cohesive, and there's racially polarized voting.

So what *Strickland* said, Justice Kennedy, is that it's very difficult to decide exactly what the right type of voters that you need to bring in when you change a district. It's very hard to determine the impact of incumbency because certainly it's likely that Congressman Butterfield would do better in his district than a newcomer. I think the political science on that is indisputable.

So what the Court in *Strickland* said was that courts [725] and legislatures meet a judicially manageable standard, and that's – that was the reason for the 50-percent-plus-one rule.

I mean, arguably, Your Honor, as you pointed out, if the 50 percent plus one is not needed, then the district goes away. Then we shouldn't even have to be talking about a

47 percent district at that point in time. I don't think any witness in this case, either in the *Dickson* state court trial or this case, is advocating that we abolish a district in Northeastern North Carolina that has a significantly high percentage of black population.

In fact, Your Honor, again, all the districts that have been proposed, even in 2011, are majority minority coalition districts. They're not majority non-Hispanic white districts. I think you may recall the evidence that in – at the time of the 2010 Census, the 1st Congressional District had over 50 percent registered – over 50 percent of the registered voters were African-Americans.

So the question I would leave the Court with, Your Honor, is we think both of these districts are legal. We think Dr. Ansolabehere's use of registration statistics to try to prove intent in the 12th District has been already ruled out by the Supreme Court. We think the enacted 1st District complies with the *Strickland* case, the *Cromartie* case. We think it complies with the *Alabama* case because the *Alabama* case says we just have to have good reasons, a strong basis in the evidence. [726] We don't have to prove that an actual violation took place; but if the Court finds that there is a violation, what exactly is the criteria that we're supposed to follow?

In *Cromartie*, the plaintiffs have an obligation – even if they prove that race was the predominant motive for 12, they have an obligation in *Cromartie* of offering another map which shows how District 12 could be drawn without race being the predominant motive but still achieving the legitimate and political goals of the General Assembly. They've not offered such a map.

And in the 1st District, Your Honor, how is the State supposed to know what they should be doing in drawing the 1st District? What's the basis for drawing the district at 47 or 48 percent black voting-age population. With a minority-white population, you're creating a majority minority coalition district. And in *Strickland*, there's a footnote and some text actually where the Court says that the Supreme Court's never recognized a majority minority coalition district as a proper remedy for a Section 2 violation.

So when you're looking at *Alabama* and you're looking at the 1st District – if you're looking at the *Alabama* case, the Court there says North Carolina doesn't have to prove an actual violation. They have to have a strong basis in evidence to support the district, but they can accomplish that if they have good reason to think that a VRA district is required, and [727] they don't have to get the numbers exactly right.

North Carolina did not adopt a mechanical rule requiring super majority-black districts as was the case in *Alabama*. The VRA district in the northeast was drawn slightly above 50 percent, and we think the evidence shows there was more than good reason to do so.

We also think, Your Honor, the plaintiffs have not articulated why the State should be obligated to draw a majority minority coalition district instead of a majority-black district; and if the plaintiffs are correct that there's no racially polarized voting in the 1st District anymore, which I find it hard to believe that they think that, but if that's what the Court finds, then the remedy is that the 1st District goes away. There would be no obligation on the part of the State to draw any district in the northeast with any elevated black population.

JUDGE COGBURN: If the defendants, though, believe that they needed to draw a majority minority district in the 1st District, is it just coincidental that when they got to the 12th District, they turned a 42 percent black population district into a majority minority district of over 50 percent? Is that just – did they just get caught up in this – in trying to create majority minority districts over in 1 and just got carried away in 12 and went from 42 to 50?

MR. FARR: Well, Your Honor, the answer to that [728] question is there's a very, very high correlation between black voters and voting for Democratic candidates. So if you –

JUDGE COGBURN: And that's the – if you just went with that, if you just went with that, then you just might as well never worry about having any question about section factors. The argument is always going to be we didn't – yes, there were – there were lots of blacks that were moved, but we did it because they were Democrats, and there would never be a question about it because 90 percent of the time, based on what you're saying, the African-American voters would be Democratically registered.

MR. FARR: Well, that's true; they would be Democrats. So if you were going to make a stronger Democratic district in the 12th and you were going to make a stronger Republican district in the 8th and if you were going to take the 13th district out of Guilford County, it's very likely that in that part of the state the percentage of black population would go up because there's such a high correlation between black voters and the Democratic vote.

And I would point the Court out, Your Honor, to Justice Thomas' opinion in the *Cromartie* case, that's the first *Cromartie* case, where he says drawing a

majority-black district does not establish a racial gerrymander when there's a high correlation between black voters and voting for Democrats where the legislature's intention is to draw a very strong Democratic [729] district.

Unless the Court has any other questions – and I would just conclude by saying thank you, Judges, very much for putting up with us and being as cordial as you were. We appreciated it as much as the plaintiffs' counsel do. Thank you.

MR. HAMILTON: I would like to address a couple of things. First of all, *Alabama* was not a Section 5 or a Section 2 case. *Alabama* was a *Shaw* case based on the Fourteenth Amendment for race-based redistricting just like here, and the error in the – identified by the Supreme Court in the *Shaw* case was that the Court asked – the legislature asked the wrong question, and what they should have asked was to what extent must we preserve existing minority percentages to maintain the ability to elect? That's the correct question, not how can we maintain existing levels, and that is exactly what was wrong in *Alabama*.

Cromartie was a circumstantial case. Sure, you have to – and the discussion about putting in an alternative map is in a circumstantial case. In a direct evidence case, you don't need anything like that. We don't need to put in any circumstantial evidence or maps to show that it could have been drawn another way, because the fact of the matter is they told us what they were doing. They said they were drawing the districts based on race.

[730] If the Fourteenth Amendment means anything, it means that is a suspect use of race, and we're into strict scrutinyville; and application of the strict scrutiny test requires narrow tailoring of the

sort that in neither district – they didn't even attempt it in CD 12, and in CD 1, because of the misinterpretation of *Strickland*, they didn't believe that they were entitled to.

JUDGE COGBURN: We have to find, though, that it was done – that it was unexplainable other than by race, and the – with regard to 12 – I mean, the way 12 was originally drawn, did that not create a situation where when someone is trying to do it – to go to a political advantage, they're going to wind up having to switch African-American voters in and out of that district in order to do that?

MR. HAMILTON: Sure, they could have, but I submit there's a couple of problems here. The first is, again, the quote we put up here, and I think that it was the subject of a couple of questions from the Court earlier, that they moved – in CD 12, the proposed – you know, proposed political gerrymander, they actually moved people because of their race, a substantial African-American population, and they said they did. That's just direct evidence, and I completely agree with the questions from the Court.

Now, *Bartlett v. Strickland* actually said, quote: It's difficult to see how the majority bloc voting requirement [731] could be met in a district where, by definition, white voters joined in sufficient numbers with minority voters to elect the minority's preferred candidate. That's at page 1224. And, in addition, said: In areas with substantial crossover voting, it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition, bloc voting by majority voters. That's page 1248.

And I think, Your Honor, you asked a moment ago, I don't see any evidence in the record that the

legislature did any kind of *Gingles* analysis. That's exactly right, Your Honor, because they didn't. They didn't analyze any of this stuff. Yes, there were polarized –

JUDGE OSTEEN: Let me ask you about this total percentage on the charts, the 500 and 501 chart.

MR. HAMILTON: Yes.

JUDGE OSTEEN: You've got a total black voting-age population, let's say, for example, 47 percent. Then we have a margin of victory of 66 percent, but at least with respect to the chart, there's nothing in there, as Dr. Hofeller pointed out, to explain what the turnout was so you have some idea how that percentage victory compares to the composition of the district.

MR. HAMILTON: Sure.

JUDGE OSTEEN: So how do you walk us through the coalition or crossover to get to the point where you can [732] conclude, as was suggested, I think, that there is a 20 percent crossover or some percentage crossover?

MR. HAMILTON: Well, let's think – number one, we know as a matter of fact that the black voting-age population was below 50 percent. So however – and we know a second fact, that is, the outcome of the election, the African-American preferred candidate one. So it wouldn't matter – turnout doesn't matter because every single African-American voter could turn out and vote for the African-American preferred candidate, and they would still lose if there was –

JUDGE COGBURN: Not if they were the only people –

JUDGE OSTEEN: You're assuming –

MR. HAMILTON: Fair enough.

JUDGE OSTEEN: You're assuming it's 100 percent turnout to match the stats up, but we don't know that that's the case. So without a breakdown – assume the 47 percent equals 50,000 voters. Well, it may have been 50,000 plus – or not plus. That 50,000 comprises 60 percent of the winning margin. That's an extreme, and I'm not suggesting how it happened, but that's – statistically speaking, when we talk about crossover, I can't – I'm – again, walk me through how I reach that conclusion from what we've got in front of us.

MR. HAMILTON: There's no evidence that's been offered by defendants that the turnout rates differ between African-American voters and white voters or other minority [733] voters. There's simply no evidence in the record. So the only thing the Court can conclude is that they turn out in equal numbers, and so assuming, and –

JUDGE OSTEEN: How can I assume that?

MR. HAMILTON: I'm sorry?

JUDGE OSTEEN: How would I assume that?

MR. HAMILTON: Well, you have no evidence to suggest otherwise. You have registered voters that vote in the population, you've got the election results, and you know what the population statistics are for each of these districts.

JUDGE OSTEEN: True.

MR. HAMILTON: So there's no – there's no – I mean, let's just back up one step in the analysis. One thing we know, and I think we would all probably agree, is that the African-American candidate of choice won for 20 years straight in these districts even when the black voting-age population was well below 50 percent. There was no need – it's a functional analysis.

Remember the question that the Court said in *Alabama*. It's the right question. "To what extent must we preserve existing minority percentages to maintain the ability to elect?" That's the question that should have been asked, and that's the question that was not asked because of this interpretation of *Strickland* that somehow have to – have to – regardless of the voter behavior in the district, you have to [734] increase the African-American black voting-age population, which has the effect of sorting voters by race. That is exactly what the Voting Rights Act does not mean.

JUDGE GREGORY: In response to that, that chart shows that either crossover voting occurs or either that it's not required for African-Americans to elect the preferred choice.

MR. HAMILTON: That's right. That's exactly right. And the question here is what – you know, is did the General Assembly have a substantial basis in evidence? Did they have good reason to draw what they did? And the fact of the matter is they didn't because they didn't do a racially polarized voting analysis. They didn't analyze to what extent they needed – they didn't do the functional analysis required to determine the question, as described by the Court either in *Alabama* or Department of Justice in the guidance.

So the Supreme Court in the *Miller* case wrote that the essence of the Equal Protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts. The *Shaw* Court condemned those redistricting plans because they "threatened to carry us further from the goal of the political system in which race no longer matters, a goal that the Fourteenth and Fifteenth Amendments embody and to which the Nation continues to aspire."

In this case, the General Assembly used race, not politics, as a predominant factor. They told us that they did [735] it, and then they did it in these two congressional districts. I'd submit that they are – this constitutionally suspect use of race was neither required by a compelling state interest nor narrowly tailored to advance any such interest.

The Voting Rights Act is a powerful and important tool, and it took an enormous amount of energy and courage to pass, and the misinterpretation of the statute and threat that if we don't interpret it as this construction of *Gingles*, then there will be no Voting Rights Act districts does a disservice to the voters of the state of North Carolina.

Plaintiffs respectfully ask this Court to invalidate these two districts and to implement appropriate, immediate, and effective remedies for the folks of this state. Thank you all.

JUDGE OSTEEN: We're going to step down and greet the lawyers, and we will go ahead and recess Court.

(At 4:22 p.m., proceedings concluded.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the proceedings in the above-entitled matter.

Date: 10/20/2015

/s/ Joseph B. Armstrong

Joseph B. Armstrong, RMR, FCRR
United States Court Reporter
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